THE INDIAN LAW REPORTS

ALLAHABAD SERIES

CONTAINING

CASES DETERMINED BY THE HIGH COURT AT ALLAHABAD AND BY THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL ON APPEAL FROM THAT COURT AND FROM THE COURT OF THE JUDICIAL COMMISSIONER OF OUDH.

REPORTED BY:

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JUDGES OF THE HIGH COURT OF JUDICATURE AT ALLAHABAD.

1923.

Chief Justice:

The Hon'ble SIR EDWARD GRIMWOOD MEARS, KT.
(Leave for 34 days from 29th June to 1st August).

Judges:

The Hon'ble SIR PRAMADA CHARAN BANERJI, KT.
(On leave from 17th April to 2 th June).
(Acted as Chief Justice from 30th June to 1st August).
(On retiring furlough from 22nd October).

The Hon'ble MR. JUSTICE MUHAMMAD RAFIQ.
(Acted from 4th April).

The Hon'ble MR. JUSTICE THEODORE CARO PIGGOTT.

The Hon'ble MR. JUSTICE CECIL HENRY WALSH, K. C.

The Hon'ble MR. JUSTICE ALFRED EDWARD RYVES.

The Hon'ble MR. JUSTICE GOKUL PRASAD.
(Leave from 2nd July combined with vacation and from 25th October).

The Hon'ble MR. JUSTICE BENJAMIN LINDSAY.

The Hon'ble MR. JUSTICE LOUIS STUART.
(On deputation from 2nd January to 1st August).

The Hon'ble MR. JUSTICE SIDNEY REGINALD DANIELS.
(Officiated from 2nd January to 1st August).

The Hon'ble MR. JUSTICE SHAH MUHAMMAD SULAIMAN.
(Took his seat from 4th April).

The Hon'ble MR. JUSTICE KANHAIYA LAL.
(Officiated from 17th April to 1st August and then took his seat on 22nd October).

The Hon'ble MR. JUSTICE LAL GOPAL MUKERJI.
(Officiated from 3rd December).

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THE

INDIAN LAW REPORTS.

ALLAHABAD SERIES.

APPELLATE CIVIL.

Before Mr Justice [illegible] 1911

RADHA DULAIYA [illegible]

Family settlement [illegible]
The share assigned to a [illegible]
been adopted by the [illegible]
Limitation Act, [illegible]

Under a settlement [illegible] means of an arbitration a certain portion of the property was allotted to a minor widow. The widow was [illegible] She had a certain limited power of adoption and on the same day having exercised that power, the [illegible] family. Within twelve years [illegible] recovery of possession of the said share, which was then in the hands of the widow of a person who was alleged to have been adopted by the original allottee. The plaintiffs [illegible] to have this alleged adoption set aside but it was set up as a defence to the suit and the finding of the appellate court was against it.

Held that the suit was not barred [illegible] Indian Limitation Act, 1877, [illegible] adverse possession on the part [illegible] *Bandan v. Bapat* (1), referred [illegible]

The [illegible] of the Court [illegible]

Babu *Nitai Prasad Ch.* [illegible]

Dr *Satish* [illegible]

STUART and SULAIMAN, JJ. [illegible] appeal arising out of a suit for recovery of certain property including a 5 annas 1 pie zamindari [illegible]

* Second Appeal No. [illegible] of 1907, from a decree [illegible] District Judge of Jhansi, dated the [illegible] of Abdul Ali, Subordinate Judge of Jhansi, dated the 4th of November 1907.

(1) (1906) I. L. R. 28 All. 644.
(2) (1911) I. L. R. 34 All. 6.

RADHA PUTAIYA v. RASHK LAL.

6 pie share in Lalitpur. The plaintiffs' case, as set forth in the plaint, was that the property in dispute was given to one Musammat Saraswan Dulaiya under an award dated the 12th of July, 1891, that she was to have possession of it for her life, and, under the said award, the property was to revert to the plaintiffs' family, and that she died in the end of May, 1908, on which date the plaintiffs became entitled to recover possession of this property.

The claim was contested inter alia by the present defendant appellant, Musammat Radha Putaiya, who pleaded that in fact there was no such award as was alleged in existence, and further, that her deceased husband, Bansidhar Das, had been adopted by Musammat Saraswan Dulaiya and had been in possession of the property as such; and, lastly, that the claim was barred by time. Both the courts below have decreed the suit. The defendant appellant has come up on appeal to this Court, and, on her behalf, the findings of both the lower Judge are challenged.

The point for determination before us really turns on two. One is as to the validity of the award of 1891, and the second is the question of limitation.

It appears that one Janki Prasad had four sons by his first wife and five sons by the second. About the year 1891 two of the sons by the first wife had died leaving two widows, Musammat Ujhari and Musammat Saraswan Dulaiya. There were three sons by the second wife alive at the time. As the learned District Judge has recorded, it was with the object of securing peace for the family that a reference was made to certain arbitrators by Janki Prasad and his three sons by the second wife on the one hand, and Ram Prasad and Har Das, the sons by the other wife, acting for themselves and as guardians of the two minor widows of their deceased brothers, on the other. The arbitrators made an award on the 12th of July, 1891, under which half the property went to one branch and the other half was divided between Ram Prasad and Har Das and the two widows. The widows were to get possession of the quarter share given to each for their lives on condition of maintenance and, on their death, the properties were to revert to Ram Prasad and Har Das and their sons. There was, however, a provision in the award that if the widows should wish to adopt in writing a son from among the sons of Janki Prasad, Ram Prasad and Har Das or their sons, they might, and,

adoption was made, the adopted son would become the owner of the property given to the widows. At the time when this award was made, Musammat Sarawan Dulaiya was a minor and she does not appear to have attained majority till sometime about the year 1900.

It is conceded before us that inasmuch as Musammat Sarawan Dulaiya was a minor at the time and had not been properly represented, the award as an award is not binding on her, but both the courts below have come to the conclusion that this transaction was really in the nature of a family settlement and, as such, was binding on all the members of the family, even though some of them were minors at the time. About the year 1902 Musammat Sarawan Dulaiya and the other widow applied to the Revenue Court for mutation of names in respect of the share in village Patora. The passage in the judgment of the first court shows that the names of Sarawan Dulaiya as well as Damodar Das were recorded jointly and Damodar Das was described as a minor under the *sarparasti* or management of Sarawan Dulaiya. In the village Lalitpur, the defendants did not obtain possession till after the year 1910, and that was under a will left by Janki Prasad.

In our opinion there can be no doubt that Musammat Sarawan Dulaiya obtained possession of the share in village Patora in pursuance of the arrangement of 1891. In the first place, there is a finding to that effect by the learned District Judge which, in our opinion, cannot now be disturbed. Furthermore, her own conduct in applying to the Revenue Court in the years 1902 and 1904 shows that she was endeavouring to obtain possession of the share given to her by the award. We are of opinion that so long as he was alive, her possession, therefore, in the circumstances cannot be deemed to have been adverse to the other members of the family. The finding of the learned District Judge is clearly to the effect that she obtained possession in pursuance of the arrangement arrived at between the various members of the family in the year 1891. It is true that her name was not actually recorded till long after 1891, but that may be explained by the circumstance that she had not attained majority till about the year 1900.

On the question of limitation the learned advocate for the appellant first of all contended that the claim was barred by the 3 years rule as contained in article 143 of the Limitation

Act and he relied on the case of *Talevar Singh* v. *Bakeri Singh* (1). In our opinion article 113 has no application whatever to the case. This is not a claim for the specific performance of any contract and that article is inapplicable.

Next it was contended that the suit was one to sue for a declaration that the adoption set up by the defendant was invalid and that, therefore, it was governed by article 118 of the Limitation Act. On the question of adoption the learned District Judge has come to a finding of fact that in reality no adoption had taken place and all that had happened was that Mussammat Sarwan Dulaiya had declared in 1902 that the defendant had been [illegible] for adoption. It is, however, contended that whether the adoption did in fact take place or not, the claim is barred by article 118 and reliance is placed on a case of this Court reported in *Channu Lal* v. *Sita Ram* (2). In the first place in the plaint the plaintiffs did not seek any relief as to a declaration that the alleged adoption is invalid. The present suit was instituted after the death of Mussammat Sarwan Dulaiya and the plaintiffs, according to the case set forth in the plaint, were entitled to recover possession of the property. The contest merely arose in the written statement when the defendant set up the invalid adoption. This view is supported by a case of this Court in *Jankee* v. *Gopal* (3). The case relied upon by the learned advocate for the defendant, namely, *Channu Lal* v. *Sita Ram* (2), however, is not conclusive. In the first place, it is directly opposed to the ruling of the Full Bench of this Court as opposed, and, in the next, the [illegible] finally, [illegible] "As [illegible] ties in this Court [illegible] to discuss that point in the present appeal, we [illegible] entering into that question."

The view taken in *Channu Lal* v. *Sita Ram* (2) has been followed by other Courts also. In our opinion the present claim, therefore, not being a claim merely for a declaration that the defendant's adoption is invalid, is not barred by article 118 of the Limitation Act.

As to the question of the claim being barred by 12 years' adverse possession, we are of opinion that that contention also is without force. The present suit was instituted on the 23rd of April, 1920, and Mussammat Sarwan Dulaiya died on the

(1) (1903) I. L. R., 26 All., 497.
(2) (1904) I. L. R., 24 All., 5.
(3) (1906) I. L. R., 2 All., 544.

3rd of May, 1908, that is to say, just within 12 years of the institution of the suit. If the possession of Musammat Saraswan Dulaiya during her life-time was with the consent and acquiescence of the other members of the family and in pursuance of the award of 1891, it is clear that her possession can in no sense have been adverse to the other members of the family. The right to recover possession arose on the death of the widow, and from that date the claim is well within time.

On behalf of the defendant, reliance has been placed on the ruling of their Lordships of the Privy Council in *Sham Koer* v. *Dah Koer* (1), but in that case it is to be noted that their Lordships were distinctly of opinion that it had not been proved that the widow had obtained possession of the property in suit under any family arrangement at all. The evidence being *nil* and the widow not being entitled to actual possession of the property, their Lordships held that her possession must be deemed to have been adverse. In the present case we have already remarked that the finding of the learned District Judge is that the widow did obtain possession of this property under the award which embodies the arrangement arrived at by the various members of the family. The Privy Council case, therefore, is distinguishable. The plaintiffs' case thus is not barred by time. We think, therefore, that the view taken on both these points by the Lower Appellate Court is correct. The appeal fails and is hereby dismissed with costs.

Appeal dismissed.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Piggott.

KUBER DAS (PLAINTIFF) v. RAM DIN KALWAR (DEFENDANT).* 1924

Act (Local) No. II of 1901 (Agra Tenancy Act), section 95(b)—Landlord and tenant—Application for ejectment of tenant—Rent in arrears, but no decree for arrears of rent outstanding. June 22.

An application to eject an agricultural tenant will not be maintainable, in addition to the tenant's not being in arrear, there is further a decree for rent outstanding. *Tara Singh* v. *Khushal Kunwar* (2), referred to.

THIS was an appeal under section 10 of the Letters Patent from a judgment of a single Judge of the Court. The facts of the case are fully stated in the judgment under appeal, which was as follows:—

"The land in dispute is a portion of property held by a Nanakshahi endowment in the Basti district. Karan Das were formerly mahant. Upon the death of Karan Das, Anant Das took possession of the property claiming to be the successor of Karan Das. While in possession of the property, he

* Appeal No. 66 of 1921, under section 10 of the Letters Patent.

(1) (1902) I. L. R., 29 Calc., 461.

(2) (1906) I. L. R., 28 All., 630.

[illegible]

The rest of the judgment deals with the question which of the two claimants was [illegible] to [illegible] Dhan [illegible]

Munshi *Haribans* [illegible] *Prasad*, for the appellant, [illegible] that the ruling relied on by the [illegible] Judge [illegible] Section 57 of Act II of 1901 [illegible] 57 [illegible] nothing [illegible]

Munshi *Shiva Prasad Sinha*, for the respondent, [illegible] ted that the ruling relied on [illegible] was that failure to pay rent [illegible]

(1) (1919) I. L. R., 41 All., [illegible]
(2) (1896) I. L. R., [illegible] All., 610

tenancy. That amounted to forfeiture and was inconsistent with the policy of the Tenancy Act. Section 50 laid down that no tenant could be ejected otherwise than in accordance with the provisions of that Act. Section 63 provided that ejectment on any other ground than that specified in section 57, clause (*a*) was to be *by suit*. A suit, therefore, was a necessity. The reason was that the policy of the Act was to afford the tenant full opportunity to pay up.

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MEARS, C. J. and PIGOTT, J.: The point taken on behalf of the plaintiff appellant is an ingenious one and, no doubt, entitled to consideration; but we are satisfied, on the whole, that the ruling referred to by the learned Judge of this Court does govern the present case and that the decision under appeal was correct.

We dismiss this appeal with costs.

Appeal dismissed.

REVISIONAL CIVIL.

Before Mr. Justice Das.

RAJA NAGENDRA NARAYAN DEB, PLAINTIFF v. BALAKI DEBI,* DEFENDANT.

June, 27.

Bengal Tenancy Act (VIII of 1885), section 148—Execution of decree—Power of Revenue Court to grant time for payment of decree—Power of Small Cause Court to grant time for payment of money where decree for ejectment has been passed.

Where a tenant holding under an agreement to pay rent to land-holder at a certain definite period of the year is ejected from land, together with other properties, the landholder cannot, under the Bengal Tenancy Act, sue for rent of the land but he can sue other than a Revenue Court for damages on account of the dispute.

In any case, a suit for damages suffered by reason of the tenant's neglect to sow is not entertainable by a Court of Small Cause. *Fazal Khan v. Ram Parshad Bhagat* (1) and *Lala Pandeo v. Lala* (2) referred to.

THE facts are as follow:—

The plaintiff came into court on the allegation that the defendants were his occupancy tenants and they, in the year 1328 Fasli, fraudulently omitted to cultivate their fields, with the result that the land which, if tilled in due course according to the *Fasli* system, fell into arrear. The zamindar, at first, sued some of the tenants in the Revenue Court, but the final court, as well as the appellate court, dismissed the suit on the ground that under the circumstances the Revenue Court could not help the zamindar. Consequently the zamindar filed a suit for damages in the Small Cause Court on the

* Civil Revision No. 4 of 1922.

(1) (1876) I. L. R., 1 All., 217.
(2) (1911) 15 C. W. N., 50.

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allegation that he had been deprived of his share of rent on account of the fraud and dishonesty of the defendant tenant. The Small Cause Court Judge dismissed the suit.

The plaintiff appealed to the High Court.

Mr. *Manohar Ayyangar Pandit*, for the appellant, submitted that the Agra Tenancy Act did not provide for the circumstances of the present case and the Small Cause Court Judge had failed to exercise jurisdiction which he had in the matter. He referred to the abortive Revenue Court litigation and urged that the appellant should have a remedy.

Mr. *S. A. Hasdar*, for the opposite party, contended that article 8 of the schedule attached to the Small Cause Court Act was in his favour. The plaint, when studied carefully, was nothing but an ingenious attempt to conceal the real nature of the suit by clothing it in the garb of a cash suit. But, after all, it was a suit for rent and nothing more. Undoubtedly the Tenancy Act made provisions for the realization of rents from a tenant who held land under the batai system and did not raise crops in any particular year or years. He was not in any better position than a tenant whose rent was paid in cash and who allowed his cash to fall in arrears. It was true that that exact point had not been decided by any court in India, but the principle had been correctly laid down in the case of *Tayabkhan Khan v. Ram Parshad Sikagat Ji*. The Judge, the court below acted properly in declining to entertain the claim.

Ryves, J.—The first question is that the application in Civil Revision cases will lie.

The plaintiff, the Raja of Mahisa, is the proprietor of the holding in dispute. The defendant is an occupancy tenant and holds it on *batai* rent, that is to say, the rent payable by him is half the crop raised each year payable in kind. It is alleged that in the year 1327 Fasli, the defendant purposely did not sow the land, so that there was no crop.

The plaintiff sued the defendant for arrears of his rent in that year, in the Revenue Court. The pleadings are not before me.

From the judgment of the Assistant Collector, it appears that that court dismissed the suit, on the ground that the *patwari* proved that no crop had been raised on the land. On appeal, the Collector contented himself with dismissing the appeal in a judgment of a few lines, without any discussion.

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That litigation ended there. I presume it could have been taken further, but as the pleadings are not before me, I cannot say. But anyhow I think it unnecessary to pursue that question further. The Revenue Court did not refuse to hear and decide the suit: but decided it rightly or wrongly (it is immaterial which) apparently on its merits on the evidence before it.

In 1328 Fasli the defendant again did not sow the land; hence this suit, which was brought to recover Rs. 30 as damages in the Court of Small Causes at Basti.

The learned Judge says, "Rents in cash or kind are recoverable only through the Revenue Court. It is true, liability for rent in case of intentional non-production is not specially provided for in the Tenancy Act; but there does not seem to be any difference in principle in the case of non-production of crops in any particular year, and the case of removal of crops after production but before appraisement, for the purpose of estimating rent provided for in section 101, clause 4 of the Act." He, accordingly, held, that the suit was exclusively triable by the Revenue Court, and ordered the plaint to be returned for presentation to the proper court.

The plaintiff comes here in revision. It is strenuously argued, on his behalf, that section 102 (1) of the Act, read with section 104 (having especial regard to the wording of clause (4) enables a Revenue Court to give relief where the rent is payable in kind, only when a crop has in fact been grown. If a tenant deliberately refuses to sow the land, he commits a breach of his implied covenant to sow and cultivate the land with due diligence, and that, therefore, as no rent can be ever ascertained, there being no crop, much less can it be recovered on the basis of half of the harvested crop, his only remedy is to sue for damages for breach of contract.

In order, *prima facie*, to decide a question of jurisdiction, it is necessary to examine the plaint. Before proceeding further, therefore, I will give a summary of the plaint.

Paragraph 1 describes the plaintiff as the landlord, and the defendant as his occupancy tenant of the land in dispute. Paragraph 2 states, that the land was let to the defendant on the agreement (and according to a prevalent custom) that the tenant should cultivate the land and sow crops, and that the zamindar should receive half of the produce by way of rent. Paragraph 3 ... "The defendant is obstinate and headstrong, and in order to cause loss to the plaintiff did not sow the land during 1328 Fasli, but left it fallow, with the result that the plaintiff suffered a loss of Rs. 30, which he is entitled to recover from the defendant." Paragraph 4 ... As the lands are occupancy holdings of the defendant, the plaintiff cannot get them

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It seems to me that, having regard to the plaint as filed, the suit was within the jurisdiction of the Revenue Court. Admittedly the relation of landlord and tenant subsisted, and the rent in question was paid, and the plaintiff prays to recover it from the defendant. I think, for the reasons recorded below, this suit was contemplated by section 102 of the Tenancy Act, having regard to the explanatory words of the fourth schedule, serial No. 2.

Section 167 of the Tenancy Act, I think, puts the matter beyond doubt. It provides that "all suits . . . of the nature specified in the fourth schedule shall be tried and determined by the Revenue Courts, and except in the way of appeal as hereinafter provided, no suit other than a Revenue Court shall take cognizance of any dispute or matter in respect of which any such suit . . . might be brought." Turning to the fourth schedule, I find included in it serial No. 2, i.e., a suit under section 102 of the Act "for arrears of rent, or where rent is paid in kind, for money equivalent of . . . rent." It seems to me that this suit comes within section 102, i.e., a suit for [illegible] rent, "or where rent is paid in kind, for money equivalent of . . . rent," were first introduced into the Tenancy Law of these Provinces, by section 9 (1) of Act XII of 1881, apparently to give effect to the ruling of the Full Bench of this Court in *Jadu Khan* v. *Ram Parshad Bharat* (1). Apart, however, from the broad question whether such a suit lies in a civil court, I think the present suit is excluded from the cognizance of the Small Cause Court, in which it was laid, by article 6 of the Second Schedule to Act XI of 1887. The case of *Lala Parbhu Lal* v. *Bathumdee* (2) is exactly in point. Tudball, Mookerjee and Carnduff, JJ., discuss the law at length. I reject the application with costs.

Application rejected.

(1) (1876) I. L. R., 1 All. 217.
(2) 1921, 26 C. W. N. 69.

[illegible] EMPEROR v. [illegible]

[illegible] Judge [illegible] matter and came to the conclusion [illegible]. It would [illegible] the argument of the [illegible] reference by a Sessions Judge [illegible] its discretion [illegible] accused person at the [illegible]. It [illegible] follows from this view that [illegible] accused person has the right to come in revision [illegible]. At any rate he would come with [illegible] the fact that he had failed on his first application to raise the point which he relied upon [illegible] would give a discretionary power not to entertain the [illegible] application at all.

On the second point I hold a very clear view, without going into the authorities at all which have been [illegible] very able judgment by the Sessions Judge [illegible] very clear view of the matter, that there [illegible] which mark it off from any [illegible] which has been cited in argument. The charge [illegible] the accused under section [illegible] section 211, but [illegible] to be contrary to public policy and to the [illegible] principle of the administration of the criminal law to hold that when a charge has been launched which requires sanction by a particular [illegible] refused sanction, it [illegible] the ground and [illegible] which does not require sanction. [illegible] before. A useful test to my mind [illegible] under section 182 had been permitted to proceed to [illegible], if it had resulted in a conviction which was subsequently set aside for want of sanction, or on the other hand, in an acquittal also for want of sanction, it seems to me that under section 403, Criminal Procedure Code, that fact would have been an answer to a subsequent charge under section 211. The point may seem technical, but a question of principle is involved, and, however right the conviction in this case may have been on the merits, I think the only course is to [illegible] this application and quash the conviction. The conviction is, therefore, set aside. The fine, if paid, must be refunded.

RYVES, J.:—I agree.

BY THE COURT.—We accept the application in revision and quash the conviction. The fine, if paid, must be refunded.

Conviction quashed.

APPELLATE CIVIL.

Before Mr. Justice Lindsay and Mr. Justice Kanhaiya Lal.

BAHADUR SINGH AND ANOTHER (PLAINTIFFS) *v.* MOHINI KUNWAR (DEFENDANT).* 1922 June, 23

Act (Local) No. III of 1901 (United Provinces Land Revenue Act), section 107—Partition—Right of objector holding a life interest under his father's will and restricted as to alienation.

A separated Hindu bequeathed a share in a village to his daughter, who was a childless widow, for her life time, with a reversion in favour of certain male members of the family, and the devisee in the course obtained possession and mutation of names in her favour

Held that she was entitled, subject to any of the usual objections of a general nature, to claim a partition of the share bequeathed to her

Bhoop Singh v. *Mussammat Phool Kower* (1), *Jhunni Kuar* v. *Chain Sukh* (2), *Habil ullah* v. *Kashmira* (3), *Mahadeo Singh* v. *Mussammat Deo Kuer* (4), *Sundar* v. *Parbati* (5), *Hari Narayan Jog* v. *Vithu* (6) and *Durga Dat* v. *Gita* (7), referred to.

THE facts of the case sufficiently appear from the judgment of the Court.

Pandit *Uma Shankar Bajpai*, for the appellants.

Munshi *Durga Prasad*, for the respondent.

LINDSAY and KANHAIYA LAL, JJ. The dispute in this appeal relates to a one third share of the village Sewai Raghunathpur. An application was made by the defendant respondent for a partition of that share in the Revenue Court. It was opposed by the plaintiffs, who own another one-third share in the same village. Their contention was that the defendant held only a life interest therein and was entitled to get the profits of that share for her life but was not entitled to claim a partition

The Revenue Court directed the objectors to get the question of proprietary title determined by the Civil Court; and the present suit was consequently filed by them for a declaration that the defendant had only a life interest in the disputed property and was not entitled to claim a partition. The court below found against them and dismissed the suit.

The entire two thirds share belonged originally to Bishesshar Nath, the father of the defendant respondent. On the 19th of March, 1895, he executed a will, by virtue of which he

* First Appeal No. 230 of 1920, from a decree of Ali Ahsan, Subordinate Judge of Mirzapur, dated the 3rd of May, 1920.

(1) S. W. P., H. C. Rep., 1867, p. 308.
(2) (1879) I. L. R., 1 All., 709.
(3) (1880) I. L. R., 3 All., 481.
(4) (1890) 9 Oudh Cases, 53.
(5) (1899) I. L. R., 22 All., 51.
(6) (1907) I. L. R., 31 Bom., 550.
(7) (1911) I. L. R., 33 All., 443.

BARKAT KUAR v. MUSAMMAT KUNWAR.

devised his entire property in favour of his widow Parmanand, with the exception of certain immovable property reserved in favour of his wife, Musammat Champa Kunwar, and his daughter, Musammat Mohan Kunwar, and another person named [illegible] Musammat Champa Kunwar and Musammat Mohan Kunwar were allowed to enjoy the said property [illegible] the property was given to them absolutely, but they were not given any authority to make a gift of the property bequeathed to them. On the death of Musammat Champa Kunwar, her share went to Musammat Mohan Kunwar and her sons and heirs; and on the death of Musammat Mohan Kunwar, the share given to her was to devolve on her own sons or grandsons, if any, or if she had no male issue or grandsons, on Parmanand or his sons and heirs. On the death of Babu Lal Nath, the names of Musammat Champa Kunwar and Musammat Mohan Kunwar were entered in the revenue papers. On the death of Musammat Champa Kunwar, her share devolved on Hanuman Prasad, the son of Parmanand, and is now in the possession of the plaintiffs.

The court below found that, in spite of being given a power of transfer, Musammat Mohan Kunwar was entitled to enjoy all the profits of a zamindar, and her right to enjoy her share in any way she liked included a right to obtain a partition of that share.

Under section 107 of the United Provinces Land Revenue Act III of 1901 a recorded co-sharer is entitled to apply for partition. But where that share is in the possession of a mortgagee, no application for partition either by the mortgagor or the mortgagee can be entertained unless both join in applying for partition. The expression "co-sharer" has not been defined anywhere by the Act, but reading section 107 with section 32 and section 111, there can be no doubt that the co-sharer who is entitled to apply for partition must be a co-sharer of some kind of property intended to be managed by the co-sharers, a person entitled merely to collect rents or to share in the profits on behalf of the proprietor, such as a mortgagee, lessee, or thekadar, or an assignee of the rents. A Hindu widow in possession of an estate which has descended on her by inheritance from her husband represents the estate and continues in herself for certain purposes the interests of herself

and the reversionary body, whom she represents. A Muhammadan widow, who is in possession in lieu of dower, similarly combines her interest as an heir, if any, with that of the other heirs, whose shares she holds in her possession in lieu of her dower debt for her life. In either case her interest is such as to entitle her to claim a partition against her recorded co-sharers, which would bind her as much, in the absence of fraud or collusion, as those who succeed to the property on her death. The interest, which a daughter receives under a devise from her father, though limited in character, is similarly such as will entitle her to claim a partition, because she represents herself as much as those who are likely to succeed to her on her death. She is not a mere assignee of the profits. She is a proprietor for the time being, though only of a limited interest. She can manage the property in any way she likes, and let it out to any person to whom she chooses, and, short of making a transfer, she possesses all proprietary rights, including a right to hold the property in severalty or to enjoy it jointly with her co-sharers, as may suit her interests. In *Bhoop Singh* v. *Musammat Phool Kuar* (1) and *Jhumna Kuar* v. *Chain Sukh* (2) it was accordingly held that a childless Hindu widow, who succeeds to her deceased husband's share in a *mahal*, such share having been his separated property, was as much entitled as any other recorded co-sharer to claim a perfect partition of her share, if her name was recorded, though she might not be competent to alienate the same except for certain limited purposes. In *Habib ulla* v. *Kashim ba* (3) it was held that a Muhammadan widow in possession of the estate of her husband in lieu of her dower, was similarly entitled to claim a partition of her share, if she was recorded co-sharer in respect of that share. A similar view has been taken in *Mahadeo Singh* v. *Musammat Dan Kuar* (4).

In a separated family the right of each co-widow of a deceased person to enjoy the property of her deceased husband separately by partition among themselves has been recognized: *Sundar* v. *Parbati* (5) and *Hari Narayan Jog* v. *Vithi* (6). In *Durga Dat* v. *Gita* (7), it has been laid down that whatever

(1) (1867) N. W. P., H. C. Rep., 365.
(2) (1885) I. L. R., 8 All., 108.
(3) (1906) 3 A. L. J., 484.
(4) (1905) 9 Oudh Cases, 53.
(5) (1889) I. L. R., 12 All., 51.
(6) (1907) I. L. R., 33 Bom., 560.
(7) (1911) I. L. R., 33 All., 449.

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limitations there might be upon the power of alienation of one of two co-widows succeeding to such an interest in the husband's estate, there is nothing to prevent the co-sharers making a partition of such estate for certain purposes, viz. out of their interests. There is no reason why such a partition under certain circumstances should not

The interest which the widow, Mussammat Mohini Kunwar, got from her father-in-law was such an interest as would entitle her to [illegible] for the purpose of securing a better provision for herself, [illegible] control out in Hindu [illegible] the [illegible] might otherwise be [illegible] within the power of the [illegible] to prevent her from leaving her share of the profits and to compel her to stay, until she is in a position to receive her share of the profits, and to receive the same, if she gets a decree. The decisions in Jewan Das Kunwar v. Sital and Kalidas Kunwar v. Hulas Kandu do not apply, for in both the [illegible] had applied for [illegible] and had obtained the [illegible] from which the [illegible] maintenance, and [illegible] of the profits [illegible] for her life

There is nothing in the [illegible] to indicate that Mussammat Mohini Kunwar was granted a share in lieu of her maintenance. In fact a daughter is not entitled to claim maintenance from her father after she is married and has attained majority. She is a widow and has no male issue, but she is still interested and [illegible] co-sharer, though she has no right to transfer her share, and there is no reason why she should not be allowed to claim a partition thereof

The appeal, therefore, fails and is dismissed with costs

Appeal dismissed

(1) (1907) I. L. R. 29 All. 227
(2) (1911) I. L. R. 33 All. 737
(3) (1911) I. L. R. 33 All. 744

REVISIONAL CRIMINAL.

Before Mr. Justice Lindsay.

EMPEROR *v.* SHIBOO.*

Criminal Procedure Code, sections 345(2) and 439—Revision—Powers of High Court in revision to give leave to compound.

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June, 20.

The High Court can, in the exercise of its powers of revision under section 439 of the Code of Criminal Procedure, allow the composition of an offence in a case in which the court of appeal could allow composition to be made. *Emperor* v. *Ram Pigari* (1), followed.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

Pandit *Uma Shankar Bajpai*, for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

LINDSAY, J.: I think this application must be allowed. The applicant is a young boy named Shiboo, who was convicted on a charge under section 323 of the Indian Penal Code and sentenced to receive 10 stripes. At the same time his father was convicted of a similar offence and received an appealable sentence.

The father appealed and when the case came up before the learned Sessions Judge the parties to the case compounded. The learned Judge made an order for composition.

The boy had no right of appeal and the learned Sessions Judge was therefore asked to deal with the case in revision. He came to the conclusion that it was not possible for him to deal with the matter in this way and he refers to a ruling of this Court—*Emperor* v. *Husain Khan* (2). That ruling, however, does not seem to me to affect the matter which I have now before me.

Section 439 authorizes the High Court to exercise any of the powers conferred on a court of appeal, and if a court of appeal can allow the composition of an offence, it follows that the High Court can allow the composition too. There is nothing therefore to prevent the parties from compounding the offence. On the merits the learned Judge was obviously of the opinion that the case ought to be compromised but he

* [illegible] Revision No. [illegible] against the order of [illegible] Esquire, Sessions Judge of [illegible], dated the [illegible] of [illegible].

(1) (1923) I. L. R. [illegible] All. 132.

(2) (1916) I. L. R. [illegible] All. 340.

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thought that he had no authority in law to permit a composition.

In this connection I may refer the learned Judge to the ruling in *Dupee v. Hem Dupee* [1]. There it was held in which composition ought to be allowed as the parties have made up their difference. I allow the application and set aside the conviction and sentence on Shiro, passed

APPELLATE CIVIL.

Before Sir George Knox, Chief Judge, and Mr. Justice Sulaiman.

1924
June, 19.

FAKHRUDDIN KHAN (PLAINTIFF) v. RAM SAHAI (DEFENDANT)*

Limitation—Service outside the jurisdiction of the Government of United Provinces serving under military orders by an army sent from India

A person outside British India who is merely in military occupation by an army despatched by the Government of India is not "employed outside British India under the administration of the Government of India" within the meaning of section 13 of the Indian Limitation Act, 1908.

THE facts of this case are fully stated in the judgment of the Court

Babu *Lalit Mohan Banerji*, for the appellant.

Babu *Surendra Nath Gupta*, for the respondent.

KANHAIYA LAL and SULAIMAN, JJ. This appeal arises out of a suit brought by the plaintiff respondent for the recovery of money due on a promissory note executed by the defendant in favour of the plaintiff, on the 12th of April, 1915. The promissory note purports to have been executed for Rs. 1,000. The whole of this sum was payable on demand. The allegation of the defendant was that he executed the said promissory note for Rs. 1,000, that the plaintiff induced him to enter into the transaction which he entered in the taking of the promissory note from the defendant because he was a Government servant and that the claim was barred by limitation.

The court of first instance found that the promissory note in question had been executed for Rs. 1,000 by the defendant in favour of the plaintiff on an old account, and that the plaintiff was entitled to sue for the recovery of the money due to him on that document. It further held that the suit had been brought on the 14th of August, 1918, after the time allowed by

* Second Appeal No. 1012 of 1922, from a decree of Mr. Knox, District Judge of Meerut, dated the 3rd of June, 1922, reversing a decree of Babu Lal, Second Additional Sub-Judge of Meerut, dated the 22nd of November, 1919.

[1] (1909) I. L. R. 32 All., 150

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the 23rd of November, 1914, and the [illegible] published and a proclamation stating that [illegible] and the friendliness of the Britis[illegible] and salutes were fired." It [illegible] the subsequent operations in Mesopotamia remained under the charge of the Government of India; and the Mesopotamia Indian Expeditionary Force remained responsible until February, 1917." It [illegible] troops which took part in the occupation of Mesopotamia [illegible] known by the name of the Indian Expeditionary Force, and the despatches relating to its operations were published in the *Gazette of India*; but that fact is not sufficient to show that Basra was under the administration of the Government of India. Basra was occupied by the Indian troops, not the troops of that, by the troops of the Government of India, but the occupation was a military occupation for the purpose of proceeding with the expedition and protecting the army on the way onward and securing its safety and object. The territory was occupied for those purposes, not under the administration of the Government of India. It was for a military occupation, the object of which was much more restricted than that of an administration carried on for other purposes such, in our opinion, [illegible] made out in the present case. [illegible] such territory, though it may be under temporary occupation of the land above mentioned. We [illegible] are to consider the petition [illegible] finding that the petitioner [illegible] finding that the [illegible] clearly within time. In Bara Nagu [illegible] 1921 *Gopaul and others* [illegible] dated the 4th of August, 1921, [illegible] The learned counsel for the [illegible] the case may be remanded. [illegible] that the other points [illegible] may be decided by us; but [illegible] at those points had been taken. [illegible] to that request. The appeal [illegible]

Appeal dismissed.

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proved by oral evidence, although the deed was [illegible] cannot be proved for want of registration. [illegible] assuming that the deed which was produced in the [illegible] was a deed of partition I find that the lower Courts were [illegible] oral evidence of partition. As the deed also purports [illegible] was rejected for want of stamp and registration, [illegible] proved. It is not a case in which [illegible] amendment, for the case has been [illegible] after a full hearing. [illegible] Lower Court on the facts in the [illegible] of fact in this case. The appeal is dismissed with [illegible]

On the appeal

Munshi *Kanhaia Chamara Mukul* for *Munshi Hardeva Sahai*, for the appellants.

Munshi *Gulzari Lal*, for the respondent.

MEARS, C.J. and PIGOTT, J.:—This is a case in which we regret we have to allow the appeal. The fact is that the plaintiff filed a plaint alleging that he was entitled to a certain house owned and possessed by him. He gave the details of his title, but it happened that when he went into the witness box to prove his title and to prove the acts of encroachment which, as he said, gave him a right against the defendant, by a certain, no doubt truly enough, that his title rested on a partition. He produced a document which purported to be a deed of partition. It was [illegible] not [illegible] registered, and the learned Munsif, [illegible] to receive it in evidence. Unfortunately, [illegible] Munsif was persuaded to allow oral evidence to be given, not only of the bare fact that there had been a partition, which would have been unobjectionable, but also of the further fact that on the partition this house fell to the share of the plaintiff. The Munsif then decided the matter on the merits and gave the plaintiff a decree and that decree was affirmed by the lower appellate court, again on the merits. On the hearing of this appeal it did not seem to anybody to be in the objection that the Munsif was wrong, in law in receiving any oral evidence, there being in existence a complete record in writing of the partition. Nobody took that point. Then the matter came up before Mr. Justice Straight, and he did not apply, what in our view is a most salutary rule, namely, that in second appeal, appellant shall not be allowed to take points

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which have never been before the lower appellate court. He permitted, for the first time, the appellants to take the point that they could cut the ground from under the feet of the plaintiff entirely by alleging that it was incompetent for the plaintiff to give oral evidence of the contents of a written document. As MR. JUSTICE STUART has seemed to think that this evidence was receivable, it is as well that we should refer to the section of the Evidence Act and also to a case which was brought to his notice, and lay down what we believe to be the proposition of law as regards the reception of oral evidence, which must be obeyed in all courts. Section 91 of the Evidence Act of 1872 is as follows: —"When the terms of a contract, or of a grant, or of any other disposition of property have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant, or other disposition of property, or of such matter, except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained."

Now what does that rule mean? First of all, if the contract is one which is by law required to be in writing, no oral evidence can be given of the terms of the bargain between the parties. That is one case. If a transaction requires to be registered, even though there is a document which contains all the terms of the contract, it cannot, if unregistered, be looked at by the Court. As the parties have reduced their agreement into writing, they cannot be allowed to give oral evidence of the contents of that written document or of the verbal terms agreed upon before the document was drafted.

Again, if two or more parties meet together and enter into a contract which in law would have been a perfectly good contract entered into verbally, but which they, for the purposes of record or for certainty, reduce into writing, the document is the final depository of their agreement, and it is that document alone to which the court can be referred and no oral evidence can be given which seeks to vary, add to, or subtract from the contents of that written document. That is a document created under no necessity of law but brought into existence at the mutual wish of the parties. If the whole of the terms of a contract are agreed to be contained in a document, or series of documents, *e.g.*, a letter or a series of

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letters, that no extrinsic evidence of the partnership [illegible] nor to [illegible] evidence [illegible] to those letters.

Now Mr. [illegible] has referred to the case of *Abdul Rahman Brothers, In re* [illegible]. It is difficult to make out how far [illegible] the plaintiff's claim. It is, as far as I can see, in favour of the defendant. The head-note says the [illegible] of partnership may be proved by oral evidence, although the deed embodying the terms of partnership cannot be proved by want of registration. It is the contention of the plaintiff in the courts below, and, as I understand, [illegible] by, for instance, that he was in partnership with A, B and [illegible]. He can speak to that as a fact even though there is a deed of partnership destroying the rights of all the partners. No objection can be taken to the [illegible] of that kind. But the moment he [illegible] attempts to say, as in fact, that [illegible] was [illegible] adulterant and could refuse to [illegible] production and prove [illegible] an [illegible] to the [illegible] [illegible] a year's [illegible] between [illegible] but he could not [illegible] that partition [illegible] of that partnership [illegible] writing between the parties [illegible] taken before a learned Judge of this Court [illegible] a fatal objection to the plaintiff's [illegible] these objections, which are [illegible] could not be received for the first time in this Court. Still the matter has been entertained and [illegible] placed before this Court and it becomes our duty to pronounce [illegible] whether we are in agreement with him or not. We have come to the conclusion that we cannot upon [illegible] Judge and that the plaintiff could not be [illegible] to give any oral evidence of the terms of the [illegible] deed, and that the fact that he had obtained the property by means of the partition, was, in the circumstances, [illegible] incapable of proof by him. As that was a vital step in his

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case, without which he could not have got his claim properly presented to the court, his claim ought to have been dismissed. It may seem harsh, it may seem technical, but it is of the very highest importance, especially in the interests of a community that is growing commercially, that it should be thoroughly understood that if parties enter into agreements in writing, which is a highly beneficial and sensible thing to do, they are thereby protected from having their opponents giving evidence of what they say were oral arrangements, and they, on the other hand, have a true record of all that took place and was agreed between them. These rules ought to be rigidly enforced for that very purpose. They are salutary rules, and because we feel they are salutary rules, we have to allow this appeal. The consequence is that the plaintiff's suit is dismissed. As the defendant did not take this point until he came to this Court, he must pay the costs in all the courts.

Appeal allowed.

REVISIONAL CRIMINAL.

Before Mr. Justice Lindsay.

EMPEROR v. ASHIQ HUSAIN KHAN.*

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Act No. XLV of 1860 (Indian Penal Code), section 447: criminal trespass: offence attended by criminal force: Criminal Procedure Code, section 522.

The owner of a field, finding some persons thereon ploughing up his sugarcane crop, endeavored, by standing in front of the plough, to drive them to desist, but was driven off with sticks and *lathi*. The trespassers were convicted, and thereafter the owner of the field applied to the Court under section 522 of the Code of Criminal Procedure for restoration of possession.

Held that the offence could not be said to have been committed "by criminal force" and no order under section 522 was appropriate.

THE facts of the case sufficiently appear from the judgment of the Court.

Maulvi *Mukhtar Ahmad*, for the applicants.

Munshi *Surendra Nath Varma*, for the opposite party.

LINDSAY, J. This is an application in revision to set aside an order passed under section 522 of the Code of Criminal Procedure under the following circumstances:

The applicant and two others were charged by one Altaf Husain of an offence under section 447 of the Indian Penal Code, *i.e.*, the offence of criminal trespass. The complainant

* Criminal Revision No. 753 of 1922, from an order (I. D. W. 1) Macleod, District Magistrate of Lucknow, dated the 4th of April, 1922.

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alleged that he was in possession of certain fields and that when he went to them one morning he found the crop cut and their servants ploughing the fields and appropriating the crop. He remonstrated and stood in front of the ploughs to stop the ploughing, whereupon the accused who were armed with sticks and spears rushed at him and struck him and drove him out of the fields. This prosecution story was accepted and the accused were convicted. The conviction was upheld in appeal. After the order in appeal had been passed the complainant applied to the Magistrate to be restored to possession and an order was passed accordingly under section 522, Criminal Procedure Code. The District Magistrate refused to interfere in revision with this order and hence the present application.

The argument here, as it was in the courts below, is that no order could legally have been made under section 522, inasmuch as it is not shown that the dispossession of the complainant, Altaf Husain, was effected by the use of criminal force. It is contended that even if criminal force was used, the dispossession was complete before any such force was resorted to. But it is clear that there was no force any use of criminal force. The District Magistrate in the order in revision thought that criminal force was not used, but I do not agree. It was proved that the complainant who had hitherto in front of the party was driven off by means of the accused having spears with them and striking threats around. Thus, I find that the use of criminal force as defined in sections 349 and 350 of the Indian Penal Code. It must be taken therefore that the offences which the accused were convicted were committed by criminal force," to quote the language of section 522.

As for the argument that the dispossession was not forcibly effected by criminal force, I am unable to entertain it. It is not, in my opinion, correct to say that the accused had actually assumed peaceable possession before the complainant arrived on the scene. The complainant came up while the acts of criminal trespass were still in progress and he had not already been effectively dispossessed. That only took place when the complainant was actually driven off his lands and, as has been shown, the act which drove him away was the use of criminal force by the accused.

In these circumstances I hold that the order under section 522, Criminal Procedure Code, was justified and there is no case, therefore, for interference in revision.

I may also add that it has been brought to my notice that in proceedings taken under section 145 of the Code of Criminal Procedure an order giving possession of these same lands to Altaf Husain has been made, and on the 16th of June, 1922, REVNS, J., refused to interfere with this order (see Criminal Reference No. 306 of 1922, decided on the 16th of June, 1922). This fact is an additional reason for refusing the present application, which I dismiss accordingly.

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EMPEROR v. ALTAF HUSAIN KHAN

FULL BENCH.

Before Sir Grimwood Mears, Knight, Chief Justice, Mr. Justice Piggott, Mr. Justice Walsh, Mr. Justice Ryves and Mr. Justice Lindsay.

SHIB DAYAL (PLAINTIFF) v. MUHARMAN AND OTHERS (DEFENDANTS).*

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Act No. IV of 1882 (Transfer of Property Act), section 99, Cl. (a)—Act No. XIII of 1904 (Indian Limitation Act), article 120, Sch. I—Mortgage—Term twelve years, but option given to mortgagee of suing for the whole amount due on default in payment of interest—Suit to recover mortgage money—Limitation—Terminus a quo.

A mortgage deed dated the 16th of November, 1905, contained the following covenant for interest and repayment of the mortgage debt: "I hereby covenant and give in writing that I shall pay the money aforesaid with interest at the rate of 9 annas per cent. per mensem within a period of twelve years and shall pay interest from year to year. In case of non-payment of interest from year to year, the creditor has the option to add the interest to the principal and to charge interest thereon at the above said rate, or to recover through the court principal and interest from me and the hypothecated property and also from any person within the limitation [illegible] property and from my person within the limitation [illegible] the creditor shall not bar the claim. In case of the non-payment of the principal debt, the interest shall have the power to recover the interest, principal and interest, either with compound interest, from the hypothecated property, or from me, or from any person in possession of same. If the said principal money, interest, costs within the stipulated period, and if the creditor [illegible] same [illegible] stipulated time, then the creditor shall have the power to [illegible] and the debtor shall [illegible] Nothing [illegible] not [illegible] November, 1909, the mortgagee shall [illegible] suit [illegible]."

Held that limitation began to run against the mortgagee from the date of the first default in payment of interest and the suit for sale was therefore time-barred. It made no difference whether the right to sue for payment before the stipulated period [illegible] expired.

Second Appeal No. 889 of 1920, from a decree of E. Benard, District Judge of Farrukhabad, dated the 9th of March, 1920, reversing a decree of Rama Das, Subordinate Judge of Farrukhabad, dated the 20th of November, 1919.

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SHIB PAYAL v. MOHAMED S.

[illegible]

[illegible]

The facts of the case were as follows:

On the 16th of November, 1907, one Mahomed Sadik executed a simple mortgage deed in favour of Shib Payal. The principal amount secured was Rs. 7,000, interest was stipulated at seventeen annas per cent. per annum, payable annually, and in case of default, interest was to be added to the principal and compounded at the rate of Rs. 2 per cent. per annum. The mortgage was to be redeemed on payment of the above mentioned sum of Rs. 7,000 with interest as aforesaid, the mortgagor was given the option to redeem the principal amount [illegible] stipulated to be paid within 15 years. Nothing was paid on the 6th of November, 1917, the mortgagee brought a suit for redemption in the Court of [illegible] The Court [illegible] the suit [illegible] granted a simple money decree against the defendants. The latter appealed. The appellate Court [illegible] the mortgagee appealed to the High Court.

[illegible]

Mr. [illegible] for the appellant, relied on the Bengal Money-lenders Act, 1918, [illegible] to recover money on the basis of [illegible] the hypothecated property was governed by article 132, clause 1 of the Limitation Act, IX of 1908, which provided a period of 12 years' limitation [illegible]

The question was "when did the money become due"? and the answer depended upon the terms of each particular contract and the intention of the parties to be gathered from it. If the time began to run from the date of the first default in the payment of annual interest, *i.e.* from 16th of November, 1906, the suit was time-barred. But if time was to be reckoned from the date of repayment of principal and interest as provided for in the bond the suit was not time-barred.

It was quite clear from the terms of the mortgage-deed in suit that the creditor was given two options in case of default in payment of interest annually, namely, either to sue at once for the whole, that is the principal and interest, or to let the interest mount up at compound rate. Such a covenant gave the mortgagee an option which could not be taken away by statute unless the grant of such an option was illegal. If the mortgagee did not choose to exercise his option of suing for the whole amount due, on default of payment of interest annually by the mortgagor, it could not be said that the time began to run from such abstention. In this case the mortgagee had exercised the second option, and, therefore, money did not become due until 12 years fixed for repayment of principal had expired. He relied upon *Maha Tahal* v. *Bhagwan Singh* (1) and *Girdhari Lal* v. *Gobind Ram* (2). One of the Judges who decided the latter case was also a member of the Full Bench in *Gaya Din* v. *Jhumman Lal* (3). The Full Bench case was distinguishable because, in that case, no option had been given. The mortgagee was bound, under the terms of the deed, to sue at once on default of payment of interest, and the Full Bench held that money became due on the date of first default. The present case was similar to that of *Girdhari Lal* v. *Gobind Ram* (2) as it provided an option clause which was clearly for the benefit of the mortgagee. If the mortgagee did not choose to exercise the option, the money did not become due.

If money became due on each default of payment of interest, the most one could do would be to add the accumulated default, once for redemption. The result was that although a period was specified for payment of money, the mortgagor could not avail himself of the option before the stipulated

(1) (1907) I. L. R. 29 All. 542.
(2) (1907) I. L. R. 29 All. 547.
(3) (1907) I. L. R. 29 All. 550.

[illegible]
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Mohan [illegible]

become due, which meant payable, [illegible] *Gurdhari Lal* v. *Gokand Ram* [illegible] *Sasur Husain* 29). The Full Bench case of [illegible] *Lal* also really decided [illegible] the most part was [illegible] because the [illegible] to the [illegible]

[illegible] Limitation Act, [illegible] Limitation Act was applicable. [illegible] words of article 75 into article [illegible] further relied upon *Narain* [illegible] *Nathuram* [illegible] *Ram Parshad* [illegible] and *Sheik Mahomed* [illegible] also supported by the observations of [illegible] Privy Council in the case of *Hyde* [illegible] decided, appeal [illegible] where a decree was for [illegible] an optional right [illegible] entire decretal amount on default of [illegible] instalment, the decree-holder was bound [illegible] at once. But this point had been [illegible]

Prasad v. *Jalpa Prasad* (1), and, therefore, the case in 24 Calc. lost its importance. Even after *Gaya Din's* case, this Court had held in analogous cases relating to execution of decrees payable by instalments and containing the default clauses, that the decree-holder was not bound to execute the decree at once on default. Under section 63 of the Contract Act a promisee could dispense with or remit the performance of a promise, or could even extend time for its performance. The Full Bench case in *Gaya Din* v. *Jhamman Lal* (2) could also be distinguished on the ground that the bond in that case was an instalment bond. The present case was not a case of instalment bond. He, therefore, submitted that the decision of the majority of the Judges in the Full Bench case of *Gaya Din* v. *Jhamman Lal* was not right.

On the question of personal liability it had been consistently held by this Court that in a suit to obtain a simple money-decree, on the basis of a bond, time began to run after the expiration of the stipulated period. Such a suit, if the bond was registered, was governed by article 116 read with article 66, schedule I, of the Limitation Act. He relied upon the following cases: *Gaya Prasad* v. *Sher Ali* (3), *Makrand Singh* v. *Kallu Singh* (4), *Sham Lal* v. *Tehariya Lakhmi Chand* (5), *Mata Tahal* v. *Bhagwan Singh* (6) and *Narain Babu* v. *Gouri Persad Bias* (7).

The creditor was not bound to sue as soon as there was failure in payment of instalment of interest any year. It was open to him to do so or not. The difference was due to the different words in article 66 and article 132 of the Limitation Act.

He submitted that it was a single bond. A single bond was one which contained no penal clause. The present bond was not a bond subject to a condition because no condition was attached to the payment of money. Even if article 66 applied, every successive breach gave a fresh cause of action and a

(1) (1921) I. L. R., 16 All., 371
(2) (1918) I. L. R., 37 All., 400
(3) (1917) 15 A. L. J., 333
(4) (1919) I. L. R., 41 All., 551
(5) (1920) 18 A. L. J., 476.
(6) (1921) 19 A. L. J., 466.
(7) (1879) I. L. R., 5 Calc., 24.

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most clear for imitation. He cited S. C. *Ganesh Ch. Sen v. Hari* v. d. S. *Jaganmani* (1).

Dr. *Satyendra Nath Sen*, for the respondent, was not called upon to reply, but he cited the following authorities:

Jalal-ud-din Ahmad v. Muhammad Hasan, (2); *Nawab Nawazish Ali Khan v. Rani Lachmi Kuar*, (3); *Muhammad Sadiq Ali Khan v. Muhammad Ali Khan*, (4).

MEDDLETON, J.: This is a suit on a mortgage and certain bonds. The Second Appeal No. 1021 of 1921 and Second Appeal No. 1022 of 1921 are against appeals arising out of a suit for the sale of a mortgage-bond, dated the 16th of November, 1914, executed by the father of the present defendants in favour of the plaintiff. The defendant did not put in an appearance in the court of first instance and no written statement was filed on their behalf. The learned Subordinate Judge, relying on section 68 of the Transfer of Property Act, decreed the plaintiff's claim for the whole amount of principal and interest, on default of payment of annual interest, holding that the mortgage-debt was barred by time under section 84 of the Limitation Act, but he was, however, of opinion that the plaintiff's remedy was not barred. He, accordingly, passed a decree in a simple money suit.

Both parties appealed to the learned District Judge, Lucknow, the plaintiff asking for a decree for sale on the whole amount of principal and interest, and the defendant appellant contending that the decree of the lower appellate court should be set aside in toto. The learned Judge, in view of the contentions of the appellant, framed the following issues for determination:

1. Whether the plaintiff's claim is barred by any of the provisions of the Limitation Act, and if so, to what extent?

2. Whether, in any event, the plaintiff is entitled to a decree for sale?

The learned Judge found on the first issue that the plaintiff's claim was barred in part, and decreed the plaintiff's claim for the principal amount and interest for the last three years only. He also found on the second issue that the plaintiff was entitled to a decree for sale. He, accordingly, passed a decree for sale for the principal amount and interest for the last three years only. He also found on the second issue that the plaintiff was entitled to a decree for sale.

(1) (1924) I. L. R. 51 Cal. 749
(2) (1924) I. L. R. 46 All. 1
(3) (1922) I. L. R. 44 All. 1
(4) (1923) I. L. R. 45 All. 346

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of non-payment of interest from year to year, the creditor has the option to add the interest to the principal and to charge interest thereon at the aforesaid rate or to recover through court principal and interest from me and hypothecated property and also from my other movable or immovable property and from my person within the stipulated period. The period fixed shall not bar the claim. In case of non-payment within the stipulated period, the creditor shall have the power to sue me for the principal and interest together with compound interest, from me, mortgaged property or other movable or immovable property of mine. If I am not able to pay the money within the stipulated period and with the consent of the creditor the money remains unpaid, the interest and compound interest at the aforesaid rate shall continue to run at the stipulated rate till the date of realization."

It is clear from the terms of this document that the ordinary period fixed for payment was 12 years, and, if no default were made, the mortgagee would not have been entitled to sue for the recovery of his money before the expiry of the period fixed. If, however, a default were made in payment of the annual interest, it would be open to the mortgagee, if he so desired, to sue for the whole amount of principal and interest; and it is clear that, in that case, the mortgagee could not succeed on the plea that the claim was premature. On the other hand, there is nothing in the deed which makes it obligatory on the mortgagee to sue as soon as a default is made.

Now, there can be no doubt that a suit for sale on the basis of a mortgage-deed is one to enforce payment of money charged upon immovable property, within the meaning of article 132 of the Limitation Act of 1908. The previous decisions to the contrary were overruled by their Lordships of the Privy Council in the case of *Varadaraja Mudaliar* v. *Srinivasa Pillai* (1). This view has been accepted by the Legislature and the wording of article 132 has remained unaltered and a special period of grace provided for in section 31 of the new Act.

It being beyond question that article 132 applies, we have to look to the words in the third column of that article in order to determine the point of time from which limitation begins to run. The period of limitation is 12 years from the time "when the money sued for becomes due." We have, therefore, to answer the simple question, when did the money become due in the present case? Obviously money becomes due as soon as it becomes payable by the mortgagor to the mortgagee, that is to say, as soon as it can be legally recovered by the mortgagee. The question whether the mortgagee chooses to wait and does not sue at once is wholly immaterial.

(1) (1907) I. L. R., 30 Mad., 426.

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The money might be due and yet the mortgagee may not like to call it in at once, and may [illegible] wait for a period of 12 years. Examining the terms of the mortgage-deed in this [illegible] [illegible] with [illegible] [illegible] [illegible] [illegible] that [illegible] [illegible] [illegible] [illegible] In [illegible] [illegible] [illegible] all the [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] of A[illegible] [illegible] [illegible] period of five years [illegible] to call in the same at an [illegible] the [illegible] It was held in that [illegible] after the first default was [illegible] the cause of action arose on the first default, [illegible] time began to run from the earliest [illegible] of which the plaintiff could have brought [illegible] action. [illegible] England (vide Halsbury's Laws of England, Vol. XIX, [illegible]

It has been very strongly [illegible] that the effect of holding that time began to run from the first default would be to take out [illegible] of those cases [illegible] the mortgagee [illegible] against the [illegible] not quite easy to see what is really meant by [illegible] that the mortgagee has the option of [illegible] he is not bound to [illegible] for 12 years. If [illegible] the word [illegible] that the parties [illegible] that

[illegible] 426.

[illegible]

although the money does become recoverable yet the mortgagee can wait and at the same time keep the statute of limitation in abeyance, then it would be a case of contracting out of the statute. An agreement of this kind can never have the effect of preventing the period of limitation from running out. But as a matter of fact there is in the deed no covenant that limitation will not begin to run, and the option after all might not mean anything more than that a forbearance to sue would not disentitle the mortgagee from claiming interest, but that interest would continue to run though no suit is brought for some time. If this only is the intention of the parties, then no difficulty whatsoever arises.

Our attention has not been invited to any pronouncement of their Lordships of the Privy Council which would cover the point arising in this case. The only Privy Council case to which reference has been made is that of *Jumoonar Dass v. Mahabeer Singh* (1). Although it is conceded that the point before us did not directly arise in that case and the remark relied upon by the learned vakil for the appellant was a mere *obiter dictum*, nevertheless any observation of their Lordships is entitled to the greatest weight and should be a guide to us. It is, therefore, necessary for us to consider that case carefully. There was a mortgage-deed executed on the 21st of June, 1856, which was subsequently registered and under which it was stipulated that the money would be repaid in June, 1866, but that in the event of the lands being sold in execution of a decree obtained by a third party, the mortgagee would be at liberty at once to sue for the recovery of the debt. On the 18th of May, 1865, the lands mortgaged were actually sold in execution of a simple money decree. On the 30th of August, 1871, that is, more than six years after but within 12 years of the date of the sale, a suit to recover the amount on the mortgage-deed was instituted. The defendants pleaded that clause 16 of Act XIV of 1859, which was the general clause applicable to suits for which no other limitation was expressly provided, was applicable, and that the claim was barred by the six years' rule. Their Lordships repelled this contention, holding that the clause applicable was clause 12 which governed suits "for recovery of immovable property or of any interest in immovable property to which no other provision of this Act applies." Referring to the contention

(1) (1875) I. L. R. 1 Calc., 163

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tend to support the view that time begins to run from the date of the first default.

Nallakarappa Gounden v. *Kuvarasami Gounden* (1) and *Narna* v. *Amarnal Jhamat* (2) are to the contrary view.

The case of *Nandeshwar Prasad* v. *Jaipa Prasad* (3) was the case of execution of an ex parte decree for which different considerations altogether might arise. We consider it unnecessary to express any opinion about that case.

The case of *Maharaja of Benares* v. *Nand Ram* (4) was the case of an instalment bond which was governed by article 75 which expressly provides that the payee or obligee may waive the benefit of the provision entitling him to sue for the whole amount on default being made.

The cases of *Jivraj* v. *Kanji* (5) and *Amolak Chand* v. *Baijnath* (6) are [illegible] under article 75 and have no direct application to [illegible].

The leading case [illegible] is the case of *Gaya Din* v. *Ahammad Ali* (7). In that case the learned Judges [illegible] meaning of [illegible] time from the date of the first default. They say, at page 5 of the report: "It seems to us that the money [illegible] can be legally demanded, and it could [illegible] in the present case that the money, secured by the mortgage, could have been legally demanded and recovered after the first default, and had a suit been brought for its recovery by sale of the mortgaged property, the defendants could not have pleaded that such a suit was premature." We entirely agree with this view and consider that it lays down the right test to apply in such cases. BANERJI, J., in his dissenting judgment [illegible] was materially influenced by the circumstance that under the terms of the mortgage deed then in suit, the mortgagee was "competent to wait for the full period of 10 years originally fixed in the deed and it is not obligatory on him to call in the money on the occurrence of a default in the payment of the instalment." We are, however, distinctly of opinion that the question whether the mortgagee is bound

(1) (1917) I. L. R., 41 Mad., 29
(2) (1915) I. L. R., 39 Bom., 681
(3) I. L. R., 16 All., 371
(4) (1894) I. L. R., 22 All., 431.
(5) (1915) I. L. R., 39 All., 623
(6) (1919) I. L. R., 42 All., 465.
(7) (1915) I. L. R., 37 All., 460.

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to sue or not and whether he does it or not, is wholly irrelevant to the question as to when the cause of action arose, even though he does not choose to sue the mortgagor because due. We have, therefore, no hesitation in saying that the view taken by the majority of the learned Judges of the Full Bench case referred to above is incorrect.

[illegible] a reference to the Full Bench. Neither the report nor the judgment however, shows that the previous Full Bench case was brought to the notice of the learned Judges. We shall have occasion to refer to this case in connection with the second point raised in the appeals.

In the case of Sundram [illegible] the mortgage provided that in the event of non-payment of interest for two consecutive half years, the mortgagee would have the power either to foreclose immediately or charging compound interest [illegible] for the period fixed for the whole of the principal sum or to sue for the interest alone. The learned Judges were of opinion that when three options were given to the mortgagee and they did not choose to exercise the power of sale, for the whole amount on default of the payment of two consecutive instalments of interest, the option to sue arose and that the time began to run from [illegible]. The previous Full Bench case was distinguished on the ground that in that case the mortgage [illegible] the mortgagee of the terms of the bond [illegible] from the mortgagor." We think that the ground of distinction is well founded. In the Full Bench case the mortgagee was given the liberty to realize the entire amount with interest and if the mortgagee in his desire for interest does not bring a suit on any default, the interest [illegible] and the judgment in BANDHU, J., proceeded on the ground that the mortgagee had such an option. In any case, as we have already remarked above, the mere fact that a mortgagee has the option to sue or to wait would not prevent the money from becoming due and limitation running under article 132 at once here.

In the case of *Ramchandra* v. *Isaac Hussain* (3) the Full Bench case was followed, though presumably in deference to

(1) (1921) 59 A. L. J., 185.
(2) (1921) 19 A. L. J., 456.
(3) (1921) I. L. R., 43 All., 598.

the view expressed in the earlier case of *Girdhari Lal* v. *Gobind Ram* (1) a point was made that in the deed in question no option whatsoever was given to the mortgagee in the matter. We have already said that any distinction based on the existence of an option is a distinction without a difference and was, moreover, an error of fact. An option was given.

In the case of *Nathi* v. *Tursi* (2) the view expressed in the case of *Mata Tahal* v. *Bhagwan Singh* (3) was dissented from on the ground that it was in conflict with the Full Bench case, and it was held that "the statute in our view must run from the date of the first default. The liability to pay or, in other words, the test of whether money becomes due or not is the obligation which the borrower has taken upon himself by his signature to the written document. It cannot depend on the volition of the creditor."

The case of *Ram Das* v. *Muhammad Said Khan* (4) is, so far as we have been informed, the latest reported case of this Court following the previous Full Bench case.

Both on principle and the balance of authority, therefore, we are of opinion that the view taken by the court below is correct and that the first default having occurred more than twelve years before the suit, the money and for the matter also then and the present claim for the enforcement of the charge is barred by time under article 132 of the Limitation Act.

There remains the second question whether, even if the mortgagee cannot get a decree for sale, he is nevertheless entitled to a simple money-decree. Although the relief for recovery of money otherwise than by enforcing the charge would be governed by another article with a different period fixed, yet it would be a startling thing to find that the time for recovery of the amount due by sale of the property has begun to run, while that for recovering it as a simple debt has not yet started. One would suppose that the cause of action would be the same for both, though different periods might be fixed for the enforcement of the two reliefs. There is one case in which it has been actually held that although defaults were made yet the mortgagor was not bound to sue for the whole money as soon as there was failure in payment, and that time did not begin to run till after the date originally fixed. This

(1) (1921) I. A. [illegible], 1.
(2) (1921) I. L. R., 43 All., 671.
(3) (1931) 19. A. L. J., 406.
(4) (1932) 20 A. L. J., 846.

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is the case of *Mata Tilak* v. *Hazara Singh* [1] already referred to. [illegible] in this case [illegible] Lachhmi [illegible] This [illegible] good [illegible] not [illegible] it [illegible] of limitation [illegible] We [illegible] which the [illegible] the [illegible] the [illegible] and [illegible] the [illegible] to [illegible] the [illegible] Privy Council [illegible] and [illegible] the last [illegible] we [illegible] case of any [illegible] case of the [illegible] upon [illegible] why we [illegible]

[illegible] cases, namely, [illegible] by a different [illegible] by [illegible] the Full Bench ruling in *Gopi Lal* v. *Sitaram* [2] to which [illegible] cable, [illegible] and [illegible] The mistake which was made in *Gopi Lal's* case [2] was in assuming that it was [illegible] which governed the case. In the [illegible] referred to above, it was simply taken for granted that [illegible] Art. We think that this was not a correct view. The expression "single bond" used in article 66 is clearly quoted from the English Law. In Lord Halsbury's Laws of England, Vol. III page 80, it is said that "a bond merely for the payment of a certain

1. (1921) 19 A. L. J. 447
2. (1917) 18 A. L. J. 313
3. (1915) I. L. R. 42 All. 804
4. (1920) 2 K. B. 454
5. (1915) I. L. R. 37 All. 490.
6. (1917) 14 A. L. J. 313

sum of money without any condition in or annexed to it, is called a simple or single bond, and that such instruments are rarely, if ever, met with at the present day" . . . whereas a "double" or "conditional bond" is a form of bond accompanied by a condition in the nature of a defeasance providing that on due performance of the condition the bond shall be void. This distinction was very clearly pointed out by COLLINS, L. J., in *Dixon, Heynes* v. *Dixon* (1).

Now the bond in the present case is in marked contrast with that before the Full Bench in *Husain Ali Khan* v. *Hafiz Ali Khan* (2) which was obviously a single bond without any condition attached and it was then rightly held that article 66 read with article 116 applied. The bond in suit in the present case cannot at all be called a single bond within the meaning of article 66. The period primarily specified for payment is 12 years, but it contains the condition that in case of non-payment from year to year the creditor would either add the interest to the principal and charge interest thereon or sue for the whole money and realize the amount from the property hypothecated as well as the other property of the mortgagor. It further provides that in case the money is not paid within the stipulated period, compound interest will continue to run till realization. In our opinion such a bond cannot be regarded as a single bond, the time for suing on which runs only from the day specified.

The expression "bond subject to a condition" as used in article 68 seems also to have been borrowed from the English Law and refers to what is there called a double or conditional bond with a condition in the nature of a defeasance. The bond in question is not such a bond either. Nor is it an instalment bond within the meaning of article 75. In our opinion the case falls under article 80 which governs a "bond not herein expressly provided for" in which case the time begins to run from the date when "the bond becomes payable." It is to be noted that in the old Limitation Act, XIV of 1859, which governed the case of *Juneswar Dass* v. *Mahabeer Singh* (3), there was no clause similar to article 80 of the new Act which could take the case out of the general clause. Reading article 80 with article 116 which would be

(1) (1900) 2 Ch. D., 561 (582).
(2) (1924) I. L. R., 3 All., 600.
(3) (1878) I. L. R., 1 Calc., 168.

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applicable to a [illegible] bond [illegible] the period for recovery of a simple money [illegible] of [illegible] registered deed in suit [illegible] when the bond [illegible] payable" is, [illegible] the words "[illegible] the cause of action [illegible] and the [illegible] began to run [illegible] the enforcement of the [illegible] for a simple money [illegible]

In [illegible] SPANKIE, J., was [illegible] the following, [illegible] a bond subject [illegible] neither [illegible] article [illegible] special article [illegible] a different view.

In the case of HAR NARAIN [illegible] SPANKIE, J., was followed [illegible] A. C. J., who pointed out that [illegible] party acknowledges himself [illegible] indebted [illegible] in a certain sum of money [illegible] If there is appended [illegible] the [illegible] of a certain [illegible] is called [illegible]

We [illegible] this point [illegible] and [illegible] A. C. J., [illegible] that the present bond does not fall either under article [illegible] but falls under article [illegible] In this view of the case the time began to run [illegible] for both the reliefs claimed, from the [illegible] when the money became payable. The learned District Judge was, therefore, right in dismissing the suit in [illegible]

The result is that both these appeals fail and are hereby dismissed with costs in all courts.

Appeal dismissed.

(1) (1879) I. L. R., 2 All., [illegible]
(2) (1905) [illegible] Cases, [illegible]

APPELLATE CIVIL.

Before Mr. Justice Stuart and Mr. Justice Sulaiman.

JUGAL KISHORE (PLAINTIFF) *v.* THE GREAT INDIAN PENINSULA RAILWAY AND ANOTHER (DEFENDANTS).* 1923 *July*, 4

Act No. IX of 1908 (Indian Limitation Act), schedule I, articles 30 and 31—Railway—Suit for damages for goods not delivered or not in transit—Plaintiff prevented from filing suit by a series of dishonest misrepresentations—Limitation.

On the 28th of August, 1918, the plaintiff made over certain bales of cloth to the Great Indian Peninsula Railway Company at Bombay for transmission to Chunar. At the good shed at Chunar, the plaintiff began to make inquiries about them both from the Great Indian Peninsula Railway Company and from the East Indian Railway Company, to whom the goods would in the ordinary course of business have been transferred at Mankipur junction. For considerably over a year the plaintiff was put off by various statements on the part of the railway companies to the effect that the matter was being inquired into, but ultimately he instituted a suit for damages on the 31st of March, 1920.

Held that in the circumstances the suit was not barred by limitation whether article 30 or article 31 of the first schedule to the Indian Limitation Act, 1908, was considered applicable to the case. *Babu Chandra Secretary of State* (1) and *Madras and Southern Mahratta Railway v. Bhimappa* (2), referred to.

THE facts of the case are fully set forth in the judgment of the Court.

Dr. Kailas Nath Katju, for the appellant.

Pandit *Lalla Prasad Zutshi*, for the respondents.

STUART and SULAIMAN, JJ.:—This is a plaintiff's appeal arising out of a suit for recovery of damages for non-delivery of goods.

On the 28th of August, 1918, the plaintiff purchased certain bales of cloth at Bombay, which his commission agents made over to the G. I. P. Railway for transmission to Chunar, which is on the E. I. Railway line, and duly obtained a Railway receipt for it. The goods, however, never reached Chunar. Hence the claim.

Both the Railway companies pleaded the bar of limitation, and both tried to throw the responsibility on the other. The G. I. P. Railway Company asserted that the goods were handed over to the E. I. Railway, at Mankipur junction, while the E. I. Railway Company denied having received the goods at all. At the trial no dispute was raised as to the amount of damages claimed, nor was any issue struck on the point.

Both the courts below have found that the plaintiff has

*Second Appeal No. 341 of 1921, from a decree of B. J. Dalal, District Judge of Allahabad, dated the 26th of [illegible] 1921, reversing a decree of Mau Mohan Sanyal, Subordinate Judge of Mirzapur, dated the 16th of September, 1920.

(1) (1913) 20 Indian Cases, 177.
(2) (1912) 17 Indian Cases, 419.

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not yet recorded [illegible] that the plea [illegible] never [illegible] goods [illegible] by the [illegible] of Chan[illegible] asking [illegible] unreasonable.

[illegible] not the first which [illegible] was a delay in [illegible] the plaintiff [illegible] inquiry. [illegible] show that the [illegible] inquiry was [illegible] 1919, and that [illegible] Traffic Manager [illegible] the matter was still under [illegible] 1919, asked the [illegible] goods.

On the 22nd [illegible] sent a copy of [illegible] 1919, told him [illegible] from [illegible] were [illegible].

In [illegible] ally. In January [illegible] Company was [illegible] of the bales. On the 31st [illegible] instituted.

The recital of the [illegible] that the plaintiff was never [illegible] the goods, whether they were [illegible], nor was he told when and where they were [illegible]. On the other hand, he was all along [illegible] made, which naturally led him [illegible] continued even after the expiry of the period [illegible] is now pleaded as a bar. When the [illegible] by its own conduct, made the plaintiff [illegible] inquiry, it is rather startling to find the plea of limitation raised in defence on its behalf. However, as the contract

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agents have thought fit to refer the place, we are bound to consider it. The defendants contend [illegible] the bar of articles 30 and 31 of the Limitation Act.

Article 30 applies [illegible] exception for losing or injuring [illegible] time when [illegible] from the time when the goods ought to be delivered, [illegible] the article refers to losing or injuring goods by the carrier and not by the plaintiff, that is to say, time begins to run from the time when the carrier lost or injured the goods, and not from the time when the consignee may be said to have suffered loss. This was the view expressed by BANERJEA, J., in *Fakir Chand* v. *Secretary of State for India in Council* (1), following an earlier case of the Punjab Chief Court. We agree with his view that the [illegible] losing or injuring goods" is obvious by reference to the [illegible] of the goods to the owner, which [illegible] plaintiff's case, but an actual losing of [illegible] Now [illegible] have already [illegible] and where the [illegible] goods were lost within the [illegible] not being proved that the goods were lost by the [illegible] one year before the institution of the suit, the action is not barred by article 30.

Article 31 fixes one year from the date when the goods ought to have been delivered and applies to suits to recover compensation for non-delivery. It is to be noted that in the present case no time was fixed for the delivery of goods, and the correspondence between the parties [illegible] that the matter was being investigated into and that there was no refusal to deliver, and to deal with in case of the suit. In the circumstances of the case we are unable to hold that the suit was in [illegible] one year from the expiry of a reasonable time within which the goods should have been delivered. This view is fully supported by the decision of *The Madras and Southern Mahratta Railway Co.* v. *Bezwada* (2).

The next point is raised on the case of *Mulraddi Lal* v. *Bombay, Baroda and Central India Railway Co.* (3). That was a suit for [illegible] The goods were [illegible] the goods on the 16th of January, 1913, and in February, 1914, the plaintiff was distinctly informed that the goods were not lost but were

(1) (1920) 57 Indian Cases, 177.
(2) [illegible] 37 Indian Cases, 771.
(3) (1920) I. L. R., 45 All., 200.

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being [illegible] been claimed by [illegible] there. And [illegible] January, 1919 [illegible] letter of the [illegible] had off [illegible] J., held [illegible] of liability [illegible] claim was clearly [illegible] of the judgment [illegible] at station [illegible] of transit, but that [illegible] point which [illegible] hirely [illegible] railway [illegible] pre- [illegible] company had been [illegible] made or that [illegible]

In the present [illegible] been [illegible] of recovering the goods [illegible] and that [illegible] when the [illegible] agree [illegible] of the [illegible]

[illegible] barred by time. The [illegible] aside the decrees of the courts below and decree the plaintiff's suit with costs in all courts.

Appeal allowed.

Before Mr. Justice [illegible] and Mr. Justice [illegible]

1922 July, 4.

MOHAN LAL AND [illegible] v. [illegible] LAL AND [illegible] (DEFENDANTS).*

Mortgage—[illegible] by sale of the [illegible]

Where [illegible] the mortgaged property [illegible] to bring [illegible] gayndeh, which they claimed [illegible] held that the plaintiffs were only entitled [illegible] what was found [illegible] which they were entitled.

* Second Appeal No. [illegible] of [illegible], from a decree of [illegible] District Judge of Meerut, dated the [illegible] of February, 1922, confirming a decree of P. K. Ray, Subordinate Judge of Meerut, dated the 17th of June, 1920.

(1) (1921) I. L. R., 38 All., 744

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MOHAN LAL v. PHAGADI LAL.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Uma Shankar Bajpai*, for the appellant.

Babu *Surendra Nath Gupta*, for the respondents.

STUART and SULAIMAN, JJ.:—This is a defendant's appeal arising out of a suit for sale on the basis of a mortgage deed, dated the 21st of September, 1910, executed by defendants Nos. 1 and 2 and the father of defendant No. 3 in favour of plaintiff No. 1, the father of plaintiff No. 2, and Mohan Lal, defendant No. 4. The plaintiffs' case was that they were entitled to half the mortgage money while Mohan Lal was the owner of the other half, but as Mohan Lal had purchased the entire equity of redemption in execution of a simple money decree, they sued to recover only half the mortgage money by sale of the entire mortgaged property. The pleas raised in defence by the contesting defend nt Mohan Lal were (1) that the money was advanced by him alone and he was the sole mortgagee, the other names having been entered only fictitiously, and (2) that in any case the plaintiffs were entitled to sell only half of the mortgaged property.

The court of first instance came to the conclusion that the plaintiffs had a share in the mortgagee rights, and held that out of the mortgage money amounting to Rs. 500 the plaintiffs had contributed two sums of Rs. 75 and Rs. 87-8-0, and it gave them a decree for these two sums plus interest, but directed that the amount be realized by sale of the entire mortgaged property. This decree has been affirmed on appeal.

The defendant has come up in second appeal to this Court and two main points are urged. The first is that the sum of Rs. 75 paid by the plaintiff was included in the sum of Rs. 87-8-0 referred to in the written statement. This contention has no force. The sum of Rs. 75 has been proved to the satisfaction of both the courts below to have been paid by the plaintiffs direct to Mu mmad Mushtaq, a previous creditor mentioned in the deed, whereas Rs. 87-8-0 is an item which is found to have been paid to Mohan Lal defendant, himself towards the bond in suit.

The second point raised is as to the plaintiffs' right to sell the whole mortgaged property.

Now, it may be that in order to effect a merger the two rights must be co-extensive in some share, however small, though one be higher than the other, and that ordinarily the acquisition of a share in the equity of redemption by one only

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of several mortgage [illegible] to keep the integrity of the mortgage [illegible] interested in only a fraction [illegible] on payment [illegible] or [illegible] upon [illegible] the present [illegible] the plaintiff [illegible] had the [illegible] It would be highly [illegible] their [illegible] property, for it may [illegible] that [illegible] and sued for the [illegible] with Madan Lal [illegible] purchased in execution of [illegible] have been different. [illegible] whole property in order to realise [illegible] of the mortgage money would [illegible] result in Madan Lal [illegible] for only their shares [illegible] have admitted that [illegible] been satisfied by the acquisition [illegible] of the mortgaged property.

We are therefore [illegible] in the circumstances of this case the plaintiff [illegible] decree to recover their share of the [illegible] proportionate part of the mortgage money, which comes to Rs. 16,250 (Rs. 500 + 15,750).

We accordingly [illegible] the appeal and modify the decree of the court below. Execution of the decree should be confined by sale of only 15/16 of the mortgaged properties. A fresh decree under order 34, rule 4, will be prepared. We extend the time for payment up to six months from this date.

Appeal allowed.

Before Sir Grimwood Mears, Knight, Chief Justice and Mr. Justice Piggott.

PARTAB SINGH AND OTHERS (DEFENDANTS) *v.* BOHRA NATHU RAM AND ANOTHER (PLAINTIFFS).* 1923 July, 4.

Hindu law—Joint Hindu family—Mortgage—Mortgage executed by all the members of a joint family, being all sui juris—Renewal of mortgage by survivors of original executants—Position of sons born during the interval between the two mortgages.

A mortgage of the joint family property was executed by all the members of the family (four in number) who were all *sui juris*. Some twelve years later the three surviving executants and the widow of the fourth, who had died, executed a fresh mortgage by way of renewal of the original deed, the entire consideration consisting of the money due on the previous deed.

Held that sons born subsequently to the date of the first deed could not contest the validity of the second. *Chuttan Lal* v. *Kaida* (1) and *Krishnanand Nath Khare* v. *Raja Ram Singh* (2), referred to.

THE facts of this case are fully set forth in the judgment of the Court.

Dr. *Surendra Nath Sen* and Dr. *Kailas Nath Katju*, for the appellants.

Munshi *Panna Lal*, for the respondents.

MEARS, C. J. and PIGGOTT, J.: The suit out of which this appeal arises was brought to enforce a simple mortgage deed of the 19th of January, 1909. The executants were four persons, Kanhaiya Lal, Gauri Shankar, Mangal Sen and Mussammat Shiam Kunwar. In the suit as brought the defendants included Kanhaiya Lal and Gauri Shankar of the original executants. They included also two minor sons of Gauri Shankar and three sons of Mangal Sen. It was these sons of the original executants of the mortgage who really contested this suit, and the appeal before us is by the three sons of Mangal Sen and one of the sons of Gauri Shankar.

The main question litigated in the court below was whether the consideration for the mortgage deed in suit, amounting to Rs. 26,750, was or was not raised for such legal necessity as to make it binding upon the sons of the original executants. The learned Subordinate Judge has traced back the entire series of transactions through one hypothecation deed on simple bond after another, till he comes to loans raised in the year 1883 by Nand Ram, the great grandfather of these contesting defendants. He has finally arrived at the conclusion that the great bulk of the consideration for the bond in suit was raised for lawful necessity, so as to make the hypothecation of the property binding upon the sons of the executants.

* First Appeal No. 329 of 1920, from a decree of Ali Ausat, Subordinate Judge of Aligarh, dated the 25th of May, 1920.

(1) (1906) I. L. R., 28 All., 243.
(2) (1922) I. L. R., 44 All., 301.

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A [illegible] principal [illegible]

[illegible]

[illegible] Sahu Ram.

The appellants [illegible] of Mangu [illegible] to cross-[illegible] portion [illegible] a simple mortgage [illegible] We [illegible] it seems to us that the [illegible] appeal must be decided [illegible] history of previous [illegible] found it [illegible] for the mort-gage [illegible] deed of the [illegible] were Kanhaiya [illegible] Mangu [illegible] together with one [illegible] Mangal Sen, [illegible] widow, Musammat [illegible] mort-gage deed now in suit. On examining the record we find it to be established [illegible] of the appellants was in existence in the year 1897. [illegible] the appellant [illegible] son of Mangu [illegible] and he was born in or about the year 1897 [illegible] the four executants of the deed of the 26th of January, 1897, were on that date [illegible] the property with which they dealt. [illegible] mortgagees, who ad-vanced the sum of Rs. [illegible] for that deed, were under no obligation to make [illegible] to the purposes for which the money was wanted. They were dealing with absolute owners of the property, and it is quite beyond question that if the transaction of 1897 had been a sale instead of a mort-gage, a valid title would have passed to the vendees which could never have been questioned by sons subsequently born to one or more of the vendors. These sons took, from the mo-ment of their birth, an interest in the whole of the joint family property as it stood on the date of their birth. They could not question alienations made prior to the date of their birth, at a time when they had no interest in the property. This prin-ciple was laid down by a Bench of this Court in the case of *Chuttan Lal* v. *Kallu* (1) in a judgment in which the authorities are discussed and the principles of Hindu law applied to the circumstances of the case. There seems no reason for making

(1) (1910) I. L. R., 33 All., 283.

a distinction between an alienation by way of sale and an alienation by way of mortgage. In fact this Court has already applied the same principle to alienations of both kinds, as is apparent from the reported case above referred to. If, therefore, the present suit were one upon the mortgage of the 28th of January, 1897, those defendants, who are appellants now before us, could not challenge the validity of that mortgage or put the plaintiffs to proof of the purposes for which Kanhaiya Lal, Bhagwati Prasad, Gauri Shankar and Mangal Sen raised the money. Now the mortgage deed in suit is in favour of the same mortgagees. The recital of the document shows clearly enough what happened. The prescribed period of limitation for a suit on the deed of the 28th of January, 1897, was running out and the mortgagees were threatening to bring a suit there and then. The deed in suit was obviously the result of negotiations between the parties, and the mortgagees seem to have behaved with all reasonable leniency. They not only refrained from instituting a suit on the deed of 1897, but remitted a certain part of the accumulated arrears of interest. Some stress has been laid in argument before us on the manner in which the sum now claimed by the plaintiffs has swollen through accumulations of interest; but, after all, the covenant in regard to interest was not an exceptionally onerous one, and if mortgagors choose to permit compound interest to accumulate without making payments in order to keep it down, they must eventually come face to face with a result such as that involved in the claim now before us. There is this much to be said for the plaintiffs, that they have exercised much patience and have gone without any interest to speak of on this money for a very long period of years.

Now the question of law which we have to determine involves a certain extension of the principle laid down by this Court in the case of *Chathu Lal* v. *Kalka* (1). Admittedly the suit before us is not on the bond of 1897 but on the bond of the 19th of January, 1903; and by the bond an alienation of joint family property was effected in which the contesting defendants, who are the appellants before this Court (excepting Niranjan Prasad and perhaps Partap Singh), had by that time acquired an interest. Now, if it be a sound principle of law that those of the appellants who were born between the month of January, 1897, and the month of January, 1903, acquired

(1) (1901) I. L. R., 23 All., 283

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[illegible]

v.

[illegible] NATH ... [illegible]

[illegible] already [illegible] ... We refer to the [illegible] ... question of [illegible] ... take [illegible] ... to the [illegible].

In the [illegible] ... It [illegible] ... the appellant [illegible] ... point [illegible] Nath was [illegible] ... and [illegible] ... the [illegible] ... Nath admitted [illegible] of the various parties [illegible] ... that we have the [illegible] ... From this we know that Mangal Sen [illegible] being about 19 years of age, [illegible] in this representation, and [illegible] Mangal Sen's [illegible] ... that the young man had not completed the [illegible] for the attainment of [illegible] law.

The only other piece of evidence to which we have been referred is in the deposition of a witness named Madan Lal, one of the attesting witnesses to the document in suit. He is an oldish man and might have been expected to know the age of Mangal Sen. He was asked what Mangal Sen's age was, not in the year 1897, but in the year 1892 and if he could

(1) (1922) I. L. R., 44 All., 393

have answered that question his answer might have thrown considerable light on the [illegible] to determine. Unfortunately his answer was that M[illegible] was [illegible] a minor in the year 1891, but he could not [illegible]. In this state of the evidence we are [illegible] to hold that M[illegible] Sen had attained majority [illegible] 1897, and that his execution of that [illegible] and not open to objection on the [illegible].

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PATTAN [illegible] v. F[illegible] NAND RAM.

The result [illegible] that the appeal [illegible] fail and we dismiss it accordingly with cost[s].

Appeal dismissed.

Before [illegible] and Mr. Justice P[illegible] 1922 *July, 5*

IQBAL HAIDAL KHAN [illegible] MUSAMMAT WASI FATIMA [illegible] NARAIN [illegible] (P[illegible])*

[illegible]

THE facts of this case sufficiently appear from the judgment of the Court.

Maulvi *Iqbal Ahmad*, for the appellants.

Munshi *Kamla Kant Varma*, for the respondent.

MEARS, C. J., and PIGGOTT, J. [illegible] appeal against an order of remand. [illegible] the defendant vendors in a pre-emption [illegible] right [illegible] the 20th of [illegible] purported to [illegible] and sold in the property [illegible] of which [illegible] the vendor [illegible] property [illegible] was [illegible] misdescription [illegible]

* [illegible] Appeal No. [illegible] of 1922, from [illegible] Small Cause Court [illegible] Allahabad, dated the [illegible] 1922 [illegible]

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acquired, and it was on the strength of this evidence that the trial court held that the extent of the proprietary rights of the vendors at least exceeded a share of 5 pies. The lower appellate court has refused to treat this evidence as decisive and, upon a review of the entire evidence, has recorded its finding. We are not impressed by the contention that the learned Subordinate Judge has misiaid the burden of proof. This was a case in which evidence was led on both sides and a finding has been arrived at upon a review of the entire evidence.

There remain, however, two matters for consideration, one of which goes to the very root of the case. We have been referred to a principle, first laid down by the pre-emption Bench of this Court in *Sahodra Bibi* v. *Bageshwari Singh* (1). According to this principle it would have been, not merely open to the present plaintiff, but actually incumbent upon her, to disregard altogether any fact known to her regarding the actual extent of the proprietary rights of the vendors in this case. She could have taken them at their word and claimed to pre-empt the entire share, 4 annas and odd, of which they described themselves as full proprietors in their deed of sale. The result would presumably have been a decree for pre-emption in her favour, on the strength of which she would have stepped into the shoes of the vendees and have acquired whatever rights, proprietary or mortgagee, the vendors possessed in the entire share of 4 annas and odd. Now this was probably the way in which the plaintiff ought to have taken the matter in hand, and if the point had been raised against her either in the trial court, or in the lower appellate court, we should have felt disposed to give effect to the objection. We think it, however, very important that courts subordinate to this Court should understand that we do not expect them to do more than try out a litigation on the pleadings of the parties and on the facts raised and put in issue before them. We are not disposed to lay upon them the burden of anticipating and meeting beforehand any objection to a suit which the ingenuity of abler and better instructed counsel may find it possible to raise in this Court at the stage of second appeal. The question sought to be raised is not one of limitation, of which the court is bound to take notice once it has been raised at any stage in a litigation. The suit was

(1) (1915) I. L. R., 37 All., 592.

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share purporting to be conveyed by the deed of sale; but as a matter of fact they were the proprietors of only a small fractional share and usufructuary mortgagees in respect of the remainder. The plaintiff pre-emptor was in this difficulty she had admittedly no right to pre-empt the transfer of mortgagee rights by one usufructuary mortgagee to another. She felt herself compelled to limit her claim to that fraction of the share specified in the deed of sale of which the vendors were full proprietors. The extent of this fraction was specified in the plaint as a share of 4 pies only. The defendants replied that the fractional share held by them with full proprietary rights was in excess of 4 pies. The trial court took evidence on both sides, and eventually, without recording a precise finding as to the extent of the proprietary rights of the vendors, came to the conclusion that those rights extended over a share of 5 pies at least, if not more. On this finding the learned Munsif dismissed the suit, on the ground that it offended against the principle that a plaintiff claiming to pre-empt must pre-empt all the property sold in respect of which he has any right of pre-emption at all.

There was an appeal to the District Judge and the lower appellate court has recorded a finding that the proprietary rights of the vendors extended to a share of 4 pies only. On this finding the decree of the trial court has been reversed and the suit remanded, to be tried out on the merits with reference to other issues raised.

The present appeal is against this order of remand. In so far as the petition of appeal seeks to challenge the lower appellate court's finding as to the extent of the proprietary rights of the vendors, we think it sufficient to say that that finding is in our opinion a clear finding of fact. There was evidence on both sides. The register of proprietary rights produced by the patwari of the village was discredited by the witness himself. He said that the vendors somehow got themselves recorded as proprietors in respect of shares over which they only held mortgagee rights. The defendants produced an official from the tehsil and put in evidence an extract from a certain register of proprietary rights, by which it was sought to show that at one time in the past the vendors had acquired by purchase proprietary rights in a share of 10 pies and odd. It seems to have been admitted that they had subsequently sold one-half of the proprietary rights then

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actually tried in the courts below, the defendants acquiesced in the position taken up by the plaintiff herself that her right to pre-emption extended only to so much of the property conveyed by the deed in suit as was held by the vendors with full proprietary rights. The suit having been tried out on this basis in the courts below, we do not think we ought to allow the decision of those courts to be interfered with upon a plea which was not merely not raised by the defendants in those courts, but which is contrary to and inconsistent with the position there taken up by the defendants.

There remains only a small question regarding the order of the lower appellate court as to costs. We think it clear that there has been some error or oversight in the drawing up of the decree under appeal. There seems to be no foundation in the record for the statement that the costs of the plaintiff in the court of first instance amounted to Rs. 87 2-0. On the contrary the decree of the trial court, which is on the record, shows that the costs of the defendants were Rs. 87 2-0 while the plaintiff's costs were Rs. 11-14-0. This being a purely clerical error and having been brought to our notice while we are seised of the matter as a court of appeal, we think it right that we should correct the error at once. We do so, accordingly, by ordering that in the decree of the lower appellate court the sum of Rs. 11-14-0 be substituted for Rs. 87 2-0 as the sum payable by the defendants Nos. 1 and 2 to the plaintiff for the costs of the trial court. Except as to this matter we dismiss this appeal, and we think that the appellants must pay all costs of this appeal.

Appeal dismissed.

REVISIONAL CIVIL.

1922

July, 7.

Before Mr. Justice Lucas.

GREAT INDIAN PENINSULA RAILWAY COMPANY (Defendant) v. BHOLA NATH, DEBI DAS (Plaintiffs).*

Railway company—Liability of, for goods consigned—Risk note—Construction of document.

Goods were consigned on a "risk note" the terms of which exempted the Railway company from responsibility for the loss of the consignment when due, *inter alia*, to wilful neglect of the company's servants, and there was a proviso to the effect that "wilful neglect" did not include robbery from a running train or any other [illegible]

Held on a construction of the note that "wilful neglect" [illegible] the strict legal sense as defined in the Indian Penal Code, but did include robbery from a running train.

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GREAT INDIAN PENINSULA RAILWAY COMPANY v. BHOLA NATH DEBI DASS.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Hari Kishun Kaul* (for Dr. *Kailas Nath Katju*), for the applicant.

Mr. *N. C. Taish*, for the opposite party.

RYVES, J. :—This suit was brought by the consignee of two bales of yarn despatched from Bombay to a station of the Great Indian Peninsula Railway to recover the value of one of the bales which was lost in transit. The goods were consigned under Risk Note Form B, according to which the consignor held the railway free from all responsibility for any loss, destruction, or deterioration of, or damage to, the said consignment from any cause whatever, except for the loss of a complete consignment or of one or more complete packages forming part of a consignment, due either to the wilful neglect of the railway administration or to theft by or to the wilful neglect of its servants. There was a proviso to the effect that "wilful neglect" be not held to include "fire, robbery from a running train or any other unforeseen event or accident." It has been found that the bale was stolen during transit. The learned Judge of the Court of Small Causes has given the plaintiff a decree on the ground that the Railway Administration were liable. It seems to me that the learned Judge has misdirected himself. He says, "in short what the risk note means is, supernatural causes or reasons over which the railway servants in charge of a train may not have any control. It would seem that whilst the loss of goods from a running train by reason of any supernatural cause or robbery would not be construed as due to 'wilful neglect' of the servants of the railway, any other cause short of the above would be so construed. Therefore simple theft from a running train would be construed as due to the wilful neglect of the railway servants. The reason is clear. It is, that it may not be possible for the railway, which is after all a human institution, to fight against the supernatural; and similarly, whether owing to the seriousness of the attack, or the odds being against the railway servants, the latter might find themselves powerless to resist a band of robbers." In other words the learned Judge seems to think that robbery from a running train means something very much more serious than theft from a running train. It seems to me that "robbery" there is used really as synonymous with theft,

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and not in the sense as defined by the Penal Code. I think that this is the right interpretation and that if the learned Judge had interpreted the Risk Note in this sense he would not have given the decree which he has. In my opinion therefore this application must succeed and the decree of the court below set aside. I make no order as to costs.

Application allowed.

REVISIONAL CRIMINAL.

Before Mr. Justice Reves.

1922

July, 7.

EMPEROR v. DELLA AND OTHERS *

Criminal Procedure Code, sections 247 and 403—Acquittal under section 247 a bar to further proceedings.

Held that an acquittal under section 247 of the Code of Criminal Procedure, equally with an acquittal after trial on the merits, operates as a bar to further proceedings, by virtue of section 403 of the Code. *Empress* v. *Bhawani Prasad* (1), *Panchu Singh* v. *Umar Mahomed Sheikh* (2), and *In the matter of Gangulapu Paddaya of Palakol* (3), referred to.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

The applicants were not represented.

The Assistant Government Advocate (*Mr. B. Malcomson*), for the Crown.

REVES, J.:—This is a reference by the learned District Magistrate of Farrukhabad. It appears that three persons were acquitted by an Honorary Magistrate under section 247 of the Criminal Procedure Code because on the day fixed for the hearing of the case the complainant did not appear. The complainant filed another complaint charging the same accused with having committed the same offence on the same allegations of fact, before the same Magistrate. He referred the point as to whether having regard to section 403 of the Criminal Procedure Code he could try the case again and, having been directed to do so by the Sub-Divisional Officer, issued proceedings against the accused. The learned District Magistrate has referred the case to this Court recommending that further proceedings be quashed on the ground that under section 403 of the Criminal Procedure Code the accused persons cannot be again tried. This was the view taken by

* Criminal Reference No. 313 of 1922.

(1) Weekly Notes, 1885, p. 43.
(2) (1899) 4 C. W. N., 346.
(3) (1910) I. L. R., 34 Mad., 253.

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this Court in *Empress* v. *Bhawani Prasad* (1). The same view was taken in the case of *Pancha Singh* v. *Umar Mahomed Sheikh* (2) and *In the matter of Guggilapu Paddaya of Palakol* (3). Following these decisions I accept the reference and direct that the papers be returned.

Reference accepted.

APPELLATE CIVIL.

Before Mr. Justice Kanhaiya Lal and Mr. Justice Sulaiman.

CHHOTE LAL (PLAINTIFF) v. CHANDRA BHAN (DEFENDANT).*

1922 July, 7.

Hindu Law: Adoption: Evidence: Proof of adoption after the death of the three persons immediately concerned.

An adoption was stated to have taken place some 18 years *ante litem motam*. All the persons immediately concerned were dead. It appeared that the adoption had been recited by the natural father in a formal deed of gift; the adopted son had succeeded in due course to the property of his adoptive father, and no objection to the adoption had been raised by any member of either family. *Held* that the adoption should be considered as a legal and valid adoption, notwithstanding that there was no evidence available of the actual ceremony of adoption having been performed. *Bal Gangadhar Tilak* v. *Shrinivas Pandit* (4), *Chandra Kunwar* v. *Chandan Narpat Singh* (5) and *Har Shankar Partab Singh* v. *Lal Raghuraj Singh* (6), referred to.

THE facts of this case are fully stated in the judgment of the Court.

Dr. *Surendra Nath Sen*, Munshi *Girdhari Lal Agarwala* and Babu *Surendra Nath Gupta*, for the appellant.

Mr. *Nihal Chand*, for the respondent.

KANHAIYA LAL and SULAIMAN, JJ.: These appeals arise out of a suit by the plaintiff appellant for the possession of a certain house and for mesne profits. The house originally belonged to a person named Sheola Mal and was his self-acquired property. Sheola Mal had a son Mathra Das and a daughter, who was the mother of Raja Ram and Ram Babu. The allegation of the plaintiff was that Mathra Das had been adopted by Kunj Lal, the brother of Sheola Mal, that on the 13th of May, 1906, Sheola Mal made a gift of the said house in favour of Raja Ram and Ram Babu; that Ram Babu

*Second Appeal No. 543 of 1920, from a decree of T. K. Johnston, District Judge of Agra, dated the 10th of February, 1920, reversing a decree of Kaileshar Nath Rai, Subordinate Judge of Agra, dated the 14th of December, 1918.

(1) Weekly Notes, 1905, p. 15.
(2) (1899) 4 C. W. N., 646.
(3) (1910) I. L. R., 34 Mad., 283.
(4) (1915) I. L. R., 39 Bom., 441; L. R., 42 I. A., 135.
(5) (1906) I. L. R., 29 All., 141.
(6) (1907) I. L. R., 29 All., 519.

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predeceased Raja Ram and left no issue, and that the said house was sold in execution of a decree obtained by Raij Nath against Raja Ram and purchased by the plaintiff on the 18th of September, 1917.

The defendants on the other hand denied that Mathra Das had been adopted by Kunj Lal and asserted that if such adoption took place, it was invalid because no ceremony of adoption was performed. It was further asserted that Mathra Das and Sheola Mal lived jointly and were joint owners of the said house and that on the death of Sheola Mal it devolved on Mathra Das and his sons. The defendant Moti Lal claimed to have purchased that house in execution of a decree held by Kunwar Chand and others against the sons of Mathra Das on the 3rd of April, 1917. The other defendant Chandra Bhan claimed to have obtained this house from Moti Lal by virtue of a sale made by Moti Lal in his favour.

It appears that a suit had been filed in 1913 by Raja Ram for possession of the southern portion of the upper storey of the house in dispute against Mussamat Kalawati, the widow of Mathra Das, and Raghunath, son of Mathra Das, which was dismissed on the 12th of August, 1913. The contention of the defendants was that the dismissal of that suit operated as *res judicata*.

The court of first instance found that the previous suit operated as *res judicata* so far as the southern portion of the upper storey of the house in dispute was concerned. It held the deed of gift executed by Sheola Mal in favour of Raja Ram and Ram Babu to be valid and Sheola Mal competent to execute it. It also held that the adoption of Mathra Das was proved and that the plaintiff had a good title to the house except as regards that portion about which the previous suit brought by Raja Ram against Mussamat Kalawati and Raghunath had been unsuccessful. The lower appellate court, however, came to the conclusion that the adoption of Mathra Das was invalid and that the due execution of the deed of gift by Sheola Mal was not established. It also found that the finding in the previous suit that the deed of gift had not been proved operated as *res judicata* and was binding on the parties. It accordingly dismissed the suit.

The title of Sheola Mal to the entire house is no longer disputed. The genuineness and validity of the deed of gift are however questioned. The deed is registered and is proved by

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the scribe to have been signed by Sheola Mal. But its due attestation is not established. The deed of gift recites that Sheola Mal had given his son Mathra Das in adoption to Kunj Lal, that Mathra Das was in possession of the property belonging to Kunj Lal in that capacity, and that his daughter's sons Raja Ram and Ram Babu, whose parents were dead, were living with him and were being maintained at his expense. It then goes on to convey the entire house to Raja Ram and Ram Babu. That gift was attested by several witnesses, who state that the scribe took it to them for attestation. The evidence has been considered by the lower appellate court to be insufficient to prove due attestation and the learned counsel for the plaintiff appellant concedes that he is not in a position to challenge the correctness of that finding. That being so, the deed of gift must be treated as inoperative.

There is another reason, however, why it is not open to the plaintiff to rely on the deed of gift in proof of his title. In the previous suit filed by Raja Ram against Mussamat Kalawati and Raghunath, the execution of the deed of gift had been held to be not proved. That suit was decided after some portion of the evidence adduced by the plaintiff had been recorded. An adjournment had been obtained to produce other evidence on condition of the plaintiff paying certain costs to the opposite party, but those costs were not paid. When the case eventually came up for decision on the adjourned date, the pleader for the plaintiff stated that he had no instructions and the court proceeded to try the suit on the merits and came to the conclusion that the deed of gift had not been proved. That finding was a finding arrived at in a suit, to which the predecessor in title of the present plaintiff and the predecessor in title of the present defendant were parties, and it is not open to the plaintiff to go behind that finding in the present suit. It is argued on behalf of the plaintiff appellant that the court which tried that suit was not competent to try the present one, because the value of the property now in dispute exceeds the sum of Rs. 1,000, and the court which tried that suit could not therefore have tried the present one; but the value of the house as put down in the present plaint is only Rs. 1,000. There is an additional claim for Rs. 42 mesne profits; but that claim cannot be taken into account in determining whether the finding arrived at in the previous suit was

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arrived at by a court which was competent to try the subsequent suit. The finding in the previous suit therefore operates as *res judicata* in the present suit.

If that finding is binding on the parties to the present suit, the title, which the plaintiff seeks to establish by virtue of that deed of gift, must fail altogether. It is, however, contended that even if that gift be treated as invalid, the plaintiff ought to succeed because Raja Ram and Ram Bilas would, on the allegations made in the plaint, be al o the legal heirs of Sheola Mal and were entitled to his property on his death. That leads us to the question whether Mathra Das had been adopted by Kunj Lal and whether that adoption was valid. On that point it is necessary, in the first place, to refer to the deed of gift where the adoption is recited. In the second place, some evidence was adduced on behalf of the plaintiff to prove that adoption which was accepted by the courts below. The ceremony of *Datta Homa* was not shown to have been performed but the validity of the adoption can not be questioned now. As observed by their Lordships of the Privy Council in *Bal Gangadhar Tilak* v. *Shriniras Pandit* (1), the performance of the ceremony is not really necessary where the adoptive father and the son to be adopted belong to the same *gotra*. The lower appellate court points out that according to the statement of Kanu Mal, a witness produced by the plaintiff, Kunj Lal himself had been adopted by his brothers-in-law Beni Ram and as Beni Ram must necessarily have been of a different *gotra* from Kunj Lal the adoption of Mathra Das by a person of a different *gotra* was invalid unless it was accompanied by the performance of the said ceremony. That was not, however, the ground set up by the defendants in their defence in derogation of the adoption. A solitary statement of that character elicited in cross-examination from a witness of the opposite party, which the opposite party had no opportunity for explaining, cannot be utilized for the purpose of founding an objection which had not previously been taken or put into issue. It is possible that the plaintiff might have a good explanation as to how that statement was made or as to how such an adoption had taken place and could have been valid. In any case a plea of that character cannot be allowed to be entertained at a stage when it is not open to the other party to meet it by calling other evidence. In fact in the memorandum of appeal filed by the defendant in

(1) (1915) I. L. R., 39 Bom., 441 : L. R., 42 I. A., 136.

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the lower appellate court, no such plea had been taken and that plea must therefore be ruled as inadmissible.

In any event the adoption of Mathura Das took place, according to the deed of gift, about 48 years ago and by virtue of that adoption Mathra Das was described as having been in possession of the property of Kunj Lal. In a suit filed in 1905 by a creditor of Mathra Das, the latter was described as the adopted son of Kunj Lal. The adoption has not been challenged by any member of the family during the last 48 years and though definite evidence is not now forthcoming to prove that the *Datta Homa* ceremony had been performed at the time the adoption took place, it is permissible to presume from the fact that the adoption had not been challenged for such a long period that if the ceremony was necessary, it must have been performed. In *Chandra Kunwar* v. *Chaudhri Narpat Singh* (1) their Lordships of the Privy Council, relying on an admission of the factum of adoption made by one of the parties to the proceeding, observed that "the admission shifted the onus from the other party to the party by which such admission had been made, until the presumption that that admission was true was rebutted or satisfactorily explained."

In *Har Shankar Partab Singh* v. *Lal Raghuraj Singh* (2), at page 531, their Lordships said that "where there was initial probability that the adoption was likely to have been validly made and the conduct of the parties cognizant of the facts has been at least consistent with such an hypothesis, there was sufficient material to justify a presumption that the adoption was valid, even though direct evidence to prove that the necessary preliminaries had been performed was, owing to the lapse of time, not available."

The plaintiff could not have been reasonably expected at this distance of time to produce direct evidence to establish what preliminaries had been performed 48 years ago. Sheola Mal is dead. So is Kunj Lal. So also Mathra Das; the evidence which would have been available, had the adoption been challenged soon after it was made, has naturally disappeared with the lapse of time. In these circumstances it is reasonable to presume in the absence of anything to show the contrary that everything necessary that would have made the adoption valid was done; for if that had not been done, some one or other of the family of Sheola Mal or of Kunj Lal would have

(1) (1906) I. L. R., 29 All., 184.
(2) (1907) I. L. R., 29 All., 519.

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taken some steps within this long period to challenge the adoption or to claim the property that had been left by Kunj Lal. The ground upon which the lower appellate court has held the adoption to be invalid cannot therefore be accepted.

If the adoption is valid, the necessary result would be that the property of Sheola Mal would devolve on his death, irrespective of the deed of gift, on Raja Ram and Ram Bahn, his daughter's sons, and on the death of Ram Bahn, his interests would devolve on Raja Ram; and the sale held in execution of the decree and the purchase by the plaintiff of the interests of Raja Ram at a sale in 1917 must be treated as valid and effectual.

It only remains to consider the question of *res judicata*, which has been raised on behalf of the defendants. As we have already pointed out, the decision in the previous suit must be treated as final, so far as it relates to the southern portion of the upper storey, which was the subject matter of the claim at that time. That suit having been dismissed and the dismissal not having been set aside, that decision would operate as a final adjudication of the rights of the parties so far as that claim went. The defendants were present to prosecute their defence and the result of that decision was to invest them with an indefeasible title to the property which was then the subject matter of the claim of Raja Ram and over which they continued in possession till their rights were sold by auction and purchased by the defendant No. 2. The same however cannot be said about the remaining portion of the property. The cause of action alleged in the previous suit was that the defendants to that suit had taken possession of the southern portion of the upper storey with the permission of the agents of Raja Ram and Ram Bahn during their minority and that they were wrongfully refusing to vacate the same. The title by virtue of which Raja Ram claimed to derive his right to sue was the deed of gift said to have been executed by Sheola Mal. The deed of gift not having been proved, the claim of Raja Ram failed. But the present suit, so far as it relates to the remaining property, is however based on a different title and a different cause of action.

So far as the deed of gift is concerned the title is common and must be set aside as no longer enforceable, but so far as the right which Raja Ram and Ram Bahn claim to derive by inheritance as daughter's sons of Sheola Mal is concerned,

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that title had not been tried or determined in the previous suit. It might have been open to Raja Ram to have set up that title as an alternative ground of attack but that omission could not operate to deprive him of his right to set up that title in regard to property which was not then in dispute. The cause of action in the present suit is also different. By virtue of his purchase at auction Moti Lal claims to have obtained possession of the disputed house and the decision in the previous suit cannot therefore affect the property which was not the subject matter of the claim in the previous case.

It has been strenuously argued on behalf of the defendants respondents that the plaintiff appellant ought not to be allowed to urge in support of his claim an alternative title which had not been expressly set up either in the plaint or in the memorandum of appeal filed in the lower appellate court. In the plaint Raja Ram and Ram Bahu were described as the sons of the daughter of Sheoda Mal and a reference was also made to the deed of gift executed in their favour by their maternal grandfather. The relationship set up in the plaint was denied by the defendants but it was found by the courts below that Raja Ram and Ram Bahu were the sons of the daughter of Sheoda Mal. The daughter had died in the lifetime of Sheoda Mal. That gift was upheld by the trial court and it was obviously unnecessary to press an alternative title when the other title had been duly recognized and accepted. It is not possible to say whether before the lower appellate court the title derived by inheritance was urged; but the facts established are so plain that *prima facie* it would be doing injustice to deny to the plaintiff a right to which he is entitled on that basis. In *Skinner* v. *Nanchal Singh* (1) their Lordships of the Privy Council permitted an alternative case set up by the appellant on appeal to be the ground of judgment because "it seemed possible in that way to construct the material for a just decision of the true rights of the parties concerned, which would be the best in the interests of all and prevent further litigation."

We allow S. A. No. 543 of 1920 and dismiss S. A. No. 544 of 1920 and setting aside the decree of the lower appellate court, restore that of the court of first instance, except in so far that the parties will bear their own costs throughout.

(1) (1913) I. L. R., 36 All., 211.

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July, 7.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Piggott.

SADIQ ALI (PLAINTIFF) v. ANWAR ALI AND OTHERS (DEFENDANTS).*

Letters Patent, section 10—"Judgment"—Order refusing to set aside the abatement of an appeal—Civil Procedure Code, 1908, Sch. I, rule 9—Appeal—Practice.

An appeal will lie under section 10 of the Letters Patent from an order of a single Judge of the High Court rejecting an application to set aside the abatement of an appeal. *Wood* v. *Howard* (1), *Tulsipuree Das* v. *Alagappa Chettiar* (2) and *Kuka Mal* v. *Ram Nath* (3), referred to.

Observations on the scope of the term "judgment" as used in section 10 of the Letters Patent.

IN this case the appellant, Doctor Sadiq Ali, preferred three second appeals against Abdul Raqi Khan and others from the decrees of the District Judge of Cawnpore. Abdul Raqi Khan died on the 30th of June, 1920. Sadiq Ali did not take steps to have the names of the heirs of the deceased respondent brought on the record within six months, and the appeals automatically abated. An application was then made on the 4th of January, 1921, i.e., one day beyond time, under order XXII, rule 9, of the Code of Civil Procedure, for setting aside the abatement. MR. JUSTICE TUDBALL rejected the application on the ground that the appellant failed to prove that he had been prevented by any sufficient cause from continuing the appeals. Plaintiff appealed under section 10 of the Letters Patent.

Maulvi *Iqbal Ahmad*, for the respondent, raised a preliminary objection that no appeal lay against the order complained of. Under section 10 of the Letters Patent an appeal lay only from a judgment, and an order refusing to set aside the abatement of an appeal was not a judgment within the meaning of that section. The Legislature by using the word "judgment" intended to restrict the scope of the section. Judgment meant a decision which affected the merits of the question between the parties by determining some right or liability. The order appealed against simply debarred the appellant from reviving his appeal which by operation of law was a dead appeal and it did not affect the merits of the dispute between the parties. That was the view taken so long back as 1872 in the case of *The Justices of the Peace for Calcutta* v. *The Oriental Gas Company* (4) and it had since then consistently been followed by the High Courts of Calcutta

* Appeal No. 38 of 1921, under section 10 of the Letters Patent.

(1) (1895) I. L. R., 17 All., 438.

(2) (1910) I. L. R., 33 Mad., 1.

(3) (1906) I. L. R., 28 All., 414.

(4) (1872) 8 Beng. L. R., 488.

and Madras. He relied on *Kanhaiya Lal* v. *Pandit Dhanraj Sharma* (1), *Bihari Lall* (2), *Girish Lal Das* v. [illegible] and *Sriramulu* v. *Rama* [illegible].

The word "judgment" [illegible] applications which did not [illegible] ation of the rights of the parties. He [illegible] that the order of Mr. Justice [illegible] appeal under section 10 of the Letters Patent.

Dr. *Kailas Nath Katju*, for the applicant, contended that an adjudication was a judgment within the meaning of section 10 of the Letters Patent if its effect was to put an end to the suit or proceeding so far as the Court below was concerned. The proceeding was pending when it came before the Court and that it must be [illegible] terminating something [illegible] against which an appeal was [illegible] the proceeding. [illegible] were concerned [illegible] given in the [illegible] *The Oriental Gas Company* [illegible] was decisive in the [illegible] itself as well as the Madras High Court. *In the matter of the Bombay Gope* (5) and *Tulsiram Rai* v. *Bhagwat Charan* (6). In determining whether a particular order was or was not a "judgment" within the meaning of section 10 of the Letters Patent, the court should take into consideration the nature of the order and its effect on the proceedings pending between the parties. The Allahabad High Court in *Kanhaiya Lal* v. *Ram Nath* (7) interfered under section [illegible] order passed by a [illegible] admit an appeal or [illegible] Moreover an order [illegible] appeal is appealable under [illegible] deal with order XXII [illegible] and it would [illegible] appealable [illegible] appealable under the Letters Patent. To exclude such orders from the operation of section 10 of the Letters Patent would be

(1) (1926) I. L. R., [illegible]
(2) (1926) I. L. R., 92 Mad., 1001
(3) [illegible] Rang. L. R., 139
(5) (1918) I. L. R., 41 Cal., 744.
(6) (1919) I. L. R., 33 Mad., 1, 17)
(7) (1923) I. L. R., [illegible] All., 414

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putting too narrow a construction on the word "judgment," and the determination of the question as to what orders were or were not appealable under the Letters Patent would become purely arbitrary. So far as the Allahabad High Court was concerned it had given recognition to the principle that the orders which could be challenged by way of appeal under the Civil Procedure Code were open to appeal under section 10 of the Letters Patent. In the cases of *Ramdhar* v. *Gulab Kunr* (1), *Mansab Ali* v. *Nihal Chand* (2) and *Muhammad Nasrullah Khan* v. *Ihsan-ullah Khan* (3), the orders appealed against were not appealable under the Code of Civil Procedure and the High Court, therefore, held that no appeal lay under the Letters Patent; but these decisions were good authorities for the converse proposition also. In the rulings cited by the opposite side, the orders complained of were not appealable under the Civil Procedure Code and they were, therefore, of little help in the determination of the present question.

Maulvi *Iqbal Ahmad*, in reply submitted that order XLIII, rule 1, sub-rule (*k*) referred to the abatement of suits only and not appeals. The expression "of a suit" in sub-rule (*k*) denoted that the Legislature intended to confine its application to orders passed in suits, and an order refusing to set aside the abatement of an appeal was not open to appeal under the Civil Procedure Code. In *Kura Mal* v. *Ram Nath* (4), no preliminary objection as to the hearing of the appeal was raised and it could not, therefore, be relied upon as an authority against his contention. He further relied on *R. Wall* v. *J. E. Howard* (5).

[Counsel were then called upon to address the Court on the merits of the appeal.]

MEARS, C. J. and **PIGGOTT**, J.:—On the 27th of October, 1919, Sadiq Ali filed three second appeals in this Court making Abdul Baqi Khan and Anwar Ali respondents. Abdul Baqi Khan died on the 30th of June, 1920. When the Court re-opened on January 3rd, 1921, Sadiq Ali had that day, and that day only, upon which to take steps to get the heirs of Abdul Baqi Khan put on the record. Nothing was done on that day, and thereupon the appeals automatically abated. On January 4th, 1921, an application was made that the Court should set

(1) (1894) I. L. R., 16 All., 448.
(2) (1893) I. L. R., 15 All., 359.
(3) (1892) I. L. R., 14 All., 226.
(4) (1906) I. L. R., 28 All., 414.
(5) (1896) I. L. R., 17 All., 498.

aside the abatement. That matter was heard by Mr. Justice TUDBALL, who subsequently decided to set aside the order, and the parties come up here in appeal.

The first point which has been taken by Mr. [illegible] is that no appeal lies from the decision of Mr. Justice TUDBALL, and we propose to consider this matter, and if we find, if Mr. Iqbal Ahmad is right, we cannot inquire into the merits of the case and see if Sadiq Ali in his application to Mr. Justice TUDBALL alleged and proved that he was prevented by any sufficient cause from continuing his suit.

Whether an appeal lies from the decision of Mr. Justice TUDBALL must depend upon the proper construction of section 10 of the Letters Patent, and the word upon which the whole matter hinges, is the word "judgment." The material passage of section 10 is as follows: "An appeal shall lie to the said High Court from the judgment of one Judge of the said High Court." Now, it might [illegible] to be given the very narrow [illegible] ed in an action or might [illegible] decision which are commonly [illegible] tion has arisen in other cases and, as far back as 1880, this Court thought that the right construction of section 10 of the Letters Patent was that the word judgment included all those types of decisions which are to be found in section 12 of the Judicature Act of 1875. It may just be well to state what they are. Section 12 of the Judicature Act was providing for appeals to the Court of Appeals, and separating them into final and interlocutory appeals, and it defined those matters as "orders," "decrees" or "judgments." It was argued [illegible] to follow Mr. Justice [illegible] construction of section 10, it would follow that [illegible] Mr. Justice [illegible] in the case of [illegible] observed: "In construing the word 'judgment' in section 10 of our Letters Patent, which was [illegible] in England and use the phraseology of the English Courts, it is impossible to give to it the restricted meaning of the word 'judgment' as defined in the Code of Civil Procedure. As used in England, it is wide enough to embrace the definitions of decree, judgment and order in that Code." The learned Judge then points out that in section 10 of the Letters Patent the use of the words "sentence" or "order" in the exceptions as to criminal matters is significant, and by that he, no doubt, intends

(1) (1880) I. L. R., 17 All., 63.

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to convey that, in his opinion, the word "judgment" will have the wider significance of including orders and decrees. There is just a passage in the case of *Tuljaram Row* v. *Alagappa Chettiar* (1) which may help to throw light on this matter. The question in that case was whether an order of a single Judge on the Original side, whereby he refused to frame an issue asked for by one of the parties, was an order from which an appeal could be had. The Chief Justice, at page 7 of the report, says as follows: "The test seems to me to be not what is the form of the adjudication but what is its effect in the suit or proceeding in which it is made. If its effect, whatever its form may be, and whatever may be the nature of the application on which it is made, is to put an end to the suit or proceeding so far as the court before which the suit or proceeding is pending is concerned, or if its effect, if it is not complied with, is to put an end to the suit or proceeding, I think the adjudication is a judgment within the meaning of the clause. An adjudication on an application which is nothing more than a step towards obtaining a final adjudication in the suit is not, in my opinion, 'a judgment' within the meaning of the Letters Patent." In the separate judgment of MR. JUSTICE KRISHNASWAMI AYYAR will be found collected in useful form a number of authorities in which the word judgment is discussed and the decision to which he ultimately came was that whilst the word "judgment" covered of course final orders, it also covered preliminary and interlocutory judgments but not preliminary or interlocutory orders. That was in strict consonance with the opinion of the CHIEF JUSTICE and is an understandable interpretation of the word

The question for our decision, therefore, involves a re-examination of the facts in order to see what was the result of MR. JUSTICE TUDBALL'S order. Did it purport to put an end to and determine the rights between the parties on a matter in contest between them? If it did, it was most clearly an order, and on the interpretation given by MR. JUSTICE BURKITT of section 10 of the Letters Patent, it was also a judgment. When the application was made before MR. JUSTICE TUDBALL, Sadiq Ali was asking that in view of certain circumstances an appeal, which had in fact abated and was dead, should be revived and that Sadiq Ali should be remitted back to the position in which he stood before the expiration of the 3rd of January. MR. JUSTICE TUDBALL had to take all the

(1) (1919) I. L. R., 35 Mad., 1.

facts of the matter as they were presented to him, and had to determine whether Sadiq Ali had, to his satisfaction, showed that he was prevented by some sufficient cause from continuing the suit. When he made this order, that order, unless an appeal was given by section 10, was a final order determining once and for all that Sadiq Ali could or could not have the abatement set aside. It was a judicial act, and an act which did settle once and for all, if unappealable, the rights of the parties. Judged by the test of the case of *Wall* v. *Howard* (1), and by the Madras case reported in *Tuljaram Row* v. *Alagappa Chettiar* (2), to which reference has been made, this decision of MR. JUSTICE TUDBALL was a *judgment* within the meaning of section 10 of the Letters Patent.

In 1906 there came up on appeal to the CHIEF JUSTICE and MR. JUSTICE BANERJI, an appeal from a single Judge, who had refused to extend the time for the admission of an appeal, an application having been made to him for that purpose under section 5 of the Indian Limitation Act of 1877. The analogy between that case and this one under consideration is extraordinarily close. The applicant in the case of *Kura Mal* v. *Ram Nath* (3) had put all his facts before a single Judge of this Court, and had urged that in the circumstances he ought to be given the benefit of section 5 of the Indian Limitation Act. In the present case under consideration Sadiq Ali urged upon MR. JUSTICE TUDBALL that there were circumstances which should entitle him to have the advantage of the provision in order XXII, rule 9 (2), whereby in certain circumstances, the abatement is set aside. Both were really asking the same kind of relief. The CHIEF JUSTICE and MR. JUSTICE BANERJI went at once into the merits of the case and the counsel for the respondent did not take the point that this was an order of the single Judge unappealable to a Bench, nor did that point occur to the learned CHIEF JUSTICE or MR. JUSTICE BANERJI. We are sure that they would not have accepted and listened to the appeal unless it was a matter of common practice to admit applications which were of a character wider than those proceedings which can be strictly defined by the use of the word judgment. We are of opinion that as a general working rule there has grown up in this Court a practice of regarding those matters which are mentioned in order XLIII,

(1) (1905) I. L. R., 17 All., 498
(2) (1907) I. L. R., 30 Mad., 1
(3) (1906) I. L. R., 30 All., 414.

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rule 1, of the Code of Civil Procedure is being generally appealable from a single Judge of this Court to a Bench. In order XLIII, rule 1 (*h*), an order under rule 2 of order XXII, refusing to set aside the abatement or dismissal of a suit, is mentioned specifically as one from which an appeal shall lie. Therefore there is no doubt that there can be an appeal to this Court from the order of, for instance, a District Judge, and that matter can be heard and determined by a Bench of this Court. It is strange if there is permission to appeal, as undoubtedly there is, from the lower appellate court to this Court, that there should not also be the right of appeal not merely in a suit but when the question arises in a court of appeal. It has been argued that the very last rule of order XXII makes it right and proper for us to read order XLIII, rule 1 (*h*), as including not merely a suit but also an appeal. Taking the whole of the circumstances together, we are of opinion that it has been the practice of this Court to read the word judgment in section 10 of the Letters Patent as having a meaning which certainly covers orders in a case of this kind, and the preliminary objection therefore fails.

[Their Lordships then dealt with the particular circumstances of this case and held that under those circumstances the application ought to have been entertained.]

Appeals allowed.

Before Mr. Justice Kanhaiya Lal and Mr. Justice Sulaiman.

1922
July, 11.

MOHINDRA MAN SINGH (DEFENDANT) *v.* MAHARAJ SINGH (PLAINTIFF).*

Act No. IV of 1882 (Transfer of Property Act), section 58—Construction of document—Mortgage by conditional sale—Pre-emption—Pre-emptor's right not extending to the whole of the property sold.

A document which purported on the face of it to be a deed of sale of a share in a certain village contained the following provision:—"If within six years, in the month of Jeth, I, the executant, pay the amount of sale consideration, Rs. 3,600, and the amount of cost which may then be due against the tenants, the vendee shall reconvey the vended property to me, otherwise the property shall not be reconveyed." Further, in the body of the document the consideration for the transfer was described as "mortgage money."

Held that the transaction was a mortgage by conditional sale and not an out and out sale, and the mortgagee was still a co-sharer in the village and entitled to exercise the right of pre-emption which he had as such. *Jhanda Singh* v. *Wahid-ud-din* (1), referred to.

*First Appeal No. 201 of 1919, from a decree of Raghunath Prasad, Subordinate Judge of Mainpuri, dated the 20th of February, 1919.

(1) (1911) I. L. R., 33 All., 586.

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A pre-emptor is not debarred from suing in respect of any particular transaction of sale because his right does not extend to the whole of the property sold; but he must sue in respect of the whole of that portion of the property in respect of which his right of pre-emption subsists. *Durga Prasad* v. *Munsi* (1) and *Shobharam Rai* v. *Jiarth Rai* (2), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *B. E. O'Conor*, Dr. *Surendra Nath Sen* and Pandit *Narmadeshwar Prasad Upadhya*, for the appellant.

Babu *Piari Lal Banerji* and Munshi *Baleshwari Prasad*, for the respondent.

KANHAIYA LAL and SULAIMAN, *JJ.* :—The facts are fully set forth in our judgment dated the 3rd of August, 1921. On the 9th of June, 1917, Mrs. Kinloch executed a sale deed, in favour of the defendant vendee, of considerable property, including 4 annas in two villages, Kachhpura Bilamau and *mahal* Girwar Sikh Sohdara of Sahdli. In both the villages the plaintiff was a co-sharer at the time of the sale. On the 30th of January, 1918, under a private sale deed, the plaintiff transferred all his rights in *mahal* Girwar Sikh of village Sahdli in favour of the third party. A few months after this, the present suit for pre-emption was instituted in which the plaintiff omitted to pre-empt the share in *mauza* Sahdli. On behalf of the defendant it was pleaded *inter alia* that there was a custom of pre-emption existing in village Sahdli under which the plaintiff was entitled to pre-empt the share transferred therein, and that inasmuch as the transaction of the 30th of January, 1918, was in reality a mortgage by conditional sale, the plaintiff had still a subsisting proprietary right in it and had a right to pre-empt. By his not having claimed pre-emption in respect of a part of the property transferred, his whole claim was barred. It was further pleaded that in any case the plaintiff, having voluntarily deprived himself of his right to pre-empt a portion of the property, was prevented from pre-empting the remainder. As there was no clear finding on the question of the existence of a custom in *mauza* Sahdli, this Court sent down an issue on the point and also directed the court below to record a clear finding as to the values of the different parts of the property. That finding has been returned.

The finding on the question of custom must be accepted. The defendant produced a copy of the *wajib-ul-arz* of 1872

(1) (1923) I. L. R., 5 All., 428
(2) (1923) I. L. R., 5 All., 463

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which clearly records a custom of pre-emption under which a co-sharer in the *patti* in which the property is situated has a first right, and, after him, co-sharers in other *pattis* have a right of pre-emption. On behalf of the plaintiff an earlier *wajib-ul-arz* of 1873 was produced which merely stated that all the zamindars have the option to sell and mortgage the property but shall first transfer it to co-sharers of the village, and if they do not take it, then to a stranger. But, as pointed out by the court below, in the year 1873 the sub-divisions into *pattis* did not exist, and, therefore, the entries in the two *wajib-ul-arzes* are not necessarily contradictory. Furthermore, the defendant relied on a judgment of the year 1892 by which a claim for pre-emption was actually decreed on the basis of custom. The defendant by the production of these pieces of evidence had established a *prima facie* case that the custom exists. That case has in no way been rebutted. We are, therefore, of opinion that the finding of the lower court that there does exist a custom of pre-emption in village Saleh di, *mahal* Girwar Singh, is correct.

The next important question which requires consideration is as to whether the transaction of the 30th of January, 1918, was an out and out sale or a mortgage by conditional sale. Under that document, Maharaj Singh, in lieu of Rs. 3,000, which was part of the amount due on a previous mortgage-deed, dated the 13th of December, 1905, purported to transfer his share in village Saleh di out and out, but the document contained a provision to this effect:—"If within six years, in the month of Jeth, I, the executant, pay the amount of sale consideration, Rs. 3,000, and the arrears of rent which may then be due against the tenants, the vendee shall reconvey the vended property to me, otherwise the property shall not be reconveyed."

We may also note that at one place in the body of the document the consideration for this deed of transfer is described as "mortgage money." The original document shows that the scribe had first written the words *zar-i-saman* (sale consideration); this was struck out and the words *zar-i-rehan* (mortgage money) were substituted. The transferor actually signed this correction. There can be no doubt that unless it be shown that the intention was to the contrary, the transaction comes within the definition of clause (c) of section 58 of the Transfer of Property Act. Here there is ostensibly an out and out sale,

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but there is also a condition that "on such payment being made, the buyer shall transfer the property to the seller." *Prima facie*, therefore, the deed falls within the definition of a mortgage by conditional sale as given in section 58. It was pointed out by RICHARDS, C. J., in the case of *Hamdi Singh* v. *Wahid-ud-din* (1), that "If at the time of the execution of the first deed the parties intended that the second deed also should be executed, we ought to hold that the two deeds constituted a mortgage by conditional sale and that the plaintiff has a right to redeem. If the two deeds were of even date an almost irresistible presumption would arise in favour of the transaction being a mortgage." In the present case it is the same document which effects the transfer and also contains the stipulation as to reconveyance. We have, therefore, to see if there is anything in the document or in the contemporaneous acts and conduct of the parties which would go to show that the real intention of the parties was to execute a sale-deed, and that there was an independent agreement that the property would be re-transferred in case the whole amount was paid within the fixed period.

The learned vakil for the plaintiff has relied on a number of circumstances. His contention was that there was no motive for the execution of the mortgage deed inasmuch as no fresh advance was made and it was only in lieu of the amount due on the previous deed that this document was executed. We may, however, point out that the limitation for the document of the year 1905 was nearly running out and it was absolutely necessary either to pay it up or renew it. That circumstance, therefore, is not conclusive either way. It is also contended that if the parties had intended to execute a mortgage by conditional sale, they would have expressly said so, but we all know that documents of that kind are often executed in the garb of a sale-deed; therefore that argument also does not carry much weight. It is next pointed out that the value of the property sold was nearly equal to, if not less than, Rs. 3,000 which was the consideration for this document. This might be true, but at the same time this would not necessarily militate against the view that the document was in reality a mortgage deed. The outstanding fact remains that in the deed itself there was an express condition put down that in case the amount is paid within the period of six years, the transferee would be bound to re-transfer the

(1) (1911) I. L. R., 33 All., 595 (599).

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property to the transferor. We cannot treat it as any separate or independent agreement, and we are of opinion that on the construction of the document, reading it as a whole, there can be no doubt that it was a mortgage by conditional sale and not an out and out sale.

The result, therefore, is that even after the execution of this deed, Maharaj Singh, plaintiff, had a proprietary interest left in the *mahal* in question. He had thus a right to claim pre-emption in respect of the property situated therein. We, therefore, think that, having omitted to claim pre-emption in respect of that part of the property, his entire claim must fail, because he cannot be allowed to claim a partial pre-emption.

It was pointed out by Mr Justice Mahmood, in the case of *Durga Prasad* v. *Munsi* (1), and *Sheokaran Rai* v. *Jiach Rai* (2), "that the principle of denying the right of pre-emption except as to the whole of the property sold is that by breaking up the bargain the pre-emptor would be at liberty to take the best portion of the property and leave the worst part of it with the vendee."

These cases have since been followed uniformly by this Court. It is, however, contended by Mr P. L. Banerji, on behalf of the plaintiff, that the principle underlying these cases would only apply if the plaintiff is entitled to claim pre-emption in respect of the entire property covered by the sale deed, and that if his claim must of necessity be confined to a portion of the property sold, then the integrity is already broken and the principle would be inapplicable. We are, however, unable to accede to this contention. On the same principle we think that it is the duty of the pre-emptor to claim pre-emption in respect of the whole of that part of the property sold as to which he has a right. If the vendee has included properties in which the plaintiff has no right to pre-empt, the pre-emptor is entitled to exclude them, but he must nevertheless claim pre-emption in respect of the whole of that part with regard to which he has a right. We are, therefore, of opinion that if the plaintiff has omitted to sue for pre-emption in respect of any portion of that part over which he has a right, his whole claim must fail.

The learned advocate for the defendant appellant further contended that the plaintiff respondent, having by his own act voluntarily transferred his interest in village Salehdi, had

(1) (1884) I. L. R., 6 All., 423.
(2) (1888) I. L. R., 8 All., 462.

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deprived himself of his right to claim pre-emption in respect of that village, and inasmuch as his claim was lost owing to his own act, he was not entitled to claim pre-emption of the remaining property. In the view which we have taken as to the real nature of the transaction, it is not necessary to express any opinion on this point.

The result is that this appeal is allowed, the decree of the lower appellate court is set aside and the plaintiff's suit is dismissed with costs.

Appeal allowed.

Before Mr. Justice Kanhaiya Lal and Mr. Justice Sulaiman.

1922
July, 12.

RAGHUBANS UPADHYA AND ANOTHER (DEFENDANTS) *v.* INDARJIT SINGH AND OTHERS (PLAINTIFFS).*

Guardian and minor—Money borrowed by guardian for benefit of minor—Legal necessity—How far creditor is bound to inquire into the existence of necessity for borrowing.

If a creditor, dealing with the manager of a family or, for the matter of that, with the guardian of a minor, does make inquiries and acts honestly, the real existence of an alleged and reasonable necessity is sufficient to validate the debt, and he is not bound to see to the application of the money. *In re Sir Lala Maya Das*, (1).

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *A. P. Dube*, for the appellants.

Babu *Lalit Mohan Banerji*, for the respondents.

KANHAIYA LAL and SULAIMAN, JJ.: This was a suit for a declaration that a certain mortgage deed executed by Musammat Rupkali, on behalf of her minor son, Indarjit Singh, in favour of the defendants appellants, on the 1st of July, 1919, was null and void and not enforceable against the minor. The mortgage was executed for the sum of Rs. 750, out of which Rs. 80 were found by the first court to have been taken for the benefit of the minor. The lower appellate court, however, held that a further sum of Rs. 41 had also been taken for his benefit. The item which the court of first instance allowed was an amount taken to pay arrears of rent. The contention of the learned counsel who appears for the defendants appellants is that the amount of rent actually due by the minor was Rs. 125; but we cannot go behind the finding at which the learned District Judge has arrived on the evidence adduced.

* Second Appeal No. 814 of 1921, from a decree of A. G. F. Pullan, District Judge of Benares, dated the 17th of February, 1921, modifying a decree of Pratap Singh, City Munsif of Jaunpur, dated the 22nd of April, 1920.

(1) (1897) I. L. R., 20 All., 135.

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The item of Rs. 11 was allowed on account of a payment made to the Co-operative Bank Limited on account of a debt which existed from the time of Kuber Singh, the father of the minor. That payment was made in 1914. The whole debt due by Kuber Singh and, after his death, by Mussammat Rupkali as representing the minor, to the Co-operative Bank, had, however, run up, in 1919, to a sum of Rs. 2548-0. It is stated that on the 1st of July, 1919, a further sum of Rs. 200 was taken to pay to the Bank. The mortgage deed does not say so, but there was some evidence adduced to show that the defendants had advanced Rs. 200 for that purpose. That evidence was evidently accepted by the lower appellate court; but that item was disallowed on the ground that there was nothing to show that that money was actually paid in satisfaction of the debt. A creditor is not, however, bound to see to the application of the money. If a person, dealing with the manager of a family or, for the matter of that, with the guardian of a minor, does make inquiries and acts honestly, the real existence of an alleged and reasonable necessity is sufficient to validate the debt and he is not bound to see to the application of the money. In *Kanthu Lal* v. *Mussa Bibi* (1) it was held "that the plaintiff who had advanced money to relieve the necessities of a minor, must make all reasonable inquiries as to the fact of such necessities, and having made such inquiries and reasonably entertaining a *bond fide* belief in the existence of such necessities, he can advance his money in safety, even though it might ultimately be discovered that the sum borrowed by the guardian upon the security of the minor's estate was not in fact used for his benefit. If the creditor acts honestly and under a *bond fide* belief, arrived at after due inquiry, that the necessity existed, he is protected and is entitled to recover the debt irrespective of the manner in which the guardian may have ultimately applied it." That being so, the plaintiff was entitled to recover the sum of Rs. 200 which was taken for payment to the Co-operative Bank aforesaid. A sum of Rs. 10 ought also to be allowed on account of proportionate expenses of execution and registration. The defendants are not entitled to claim the other items in regard to which the findings of the courts below are unanimous and conclusive.

We dismiss the appeal accordingly, except in so far that we declare that the mortgage bond in question will be binding

(1) (1897) I. L. R., 20 All., 135

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on the minor to the extent of the amount awarded by the lower appellate court plus Rs. 240 and interest thereon at 1 per cent. per mensem, from the 1st of July, 1919, till the date of payment. It will be open to the plaintiff to redeem the mortgage at any time on payment of the amount due thereon as above indicated. The defendants appellants will get their proportionate costs here and hitherto from the plaintiff respondent who will get his proportionate costs from the defendants appellants throughout.

The cross objection fails and is dismissed with costs.

Decree modified.

Before Mr. Justice Kanhaiya Lal and Mr. Justice Sulaiman.

1923 July, 18.

KALLU TIWARI AND OTHERS (DEFENDANTS) v. RAJINDRA PRASAD AND ANOTHER (PLAINTIFFS).*

Agreement—Question of public policy Agreement between Parwals and Pandas to admit the latter to a share of the offerings made at a temple.

Held that an agreement between the *Parwals* of a temple and certain *Pandas* to the effect that the latter should be entitled to certain fixed shares of the moneys of pilgrims coming to visit the temple, would not be a share of the offerings made thereat, was not void as being against public policy.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. Kailas Nath Katju, for the appellants.

Munshi *Gulzari Lal*, for the respondents.

KANHAIYA LAL and SULAIMAN, JJ.: This is a defendants' appeal arising out of a suit brought by the plaintiff for recovery of a ⅓this share of a sum of Rs. 750, said to be the price of a nose-ring offered by certain wealthy pilgrims to the temple of Bindbasini Devi, at Bindhachal. The plaintiff's case was that on the 2nd of September, 1919, he entered into an agreement with the defendants under which he was entitled to get a 12 anna share in all the offerings made by the said pilgrims; that he has received his share in respect of a number of items but the defendants have not given him anything out of the proceeds of the nose-ring. On behalf of the defendants the alleged agreement was denied and it was further pleaded that such an agreement was without consideration and was unenforceable in law. The value of Rs. 750 fixed by the plaintiff was also disputed. Both the courts below have decreed the suit *in toto*.

* Second Appeal No. 1670 of 1921, from a decree of Gopal Das Mukerji, Subordinate Judge of Mirzapur, dated the 4th of April, 1921, confirming a decree of Chatur Behari Lal, Munsif of Mirzapur, dated the 4th of August, 1920.

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On appeal by the defendants it is strongly contended that the finding is insufficient to show that there was any consideration for the agreement, and that such an agreement is against public policy. And, lastly, it is urged that the finding as to the value of the jewellery is based on inadmissible evidence.

At the trial it seems to have been admitted by both the parties that a *Panda* gets his share of the offerings from *Pariwals*, if it is so agreed. The plaintiff is admittedly a *Panda* and the defendants are *Pariwals* from whose turn it was to receive the offerings on the day in question. The courts below have gone further and accepted the plaintiff's evidence which shows that "the *Pandas* take pilgrims, who visit this shrine, to the temple, they accommodate their clients at their houses, look after their comfort and go with them to the temple when they go to make offerings at the temple and to worship Deviji and though the *Pandas* have got no right to participate in the offerings made at the temple, yet, as a matter of practice, *Pariwals* give them a share, according to the terms which may be settled between the *Pariwals* and the *Pandas*, out of the offerings."

There was oral evidence to prove these facts and the lower appellate court has distinctly accepted that evidence and held that *Pandas* are as a rule given a share out of the offering in every case by mutual understanding. It was on this finding that the lower appellate court proceeded to consider the disputed question as to whether there had in fact been any agreement between the parties or not, and it came to a finding that the agreement had been proved. In our opinion, when there was this well-known established practice under which *Pandas* were to do numerous acts and were given shares in the offerings, if there was an agreement to that effect, it might very well have been that no express terms were settled at the time of the agreement, for the things which had to be done or not to be done by the plaintiff might very well have been implied by the parties. On the finding recorded by the lower appellate court, there can be no doubt that such an agreement was for consideration. We find also from a judgment on the record that such an agreement has been enforced when proved. We are unable to hold that an agreement of the kind mentioned would necessarily be against public policy. Such an agreement has been enforced in previous cases and the evidence

which has been accepted by both the courts below shows that as a matter of practice it is in force.

The finding as to the value of the jewellery is, in our opinion, a finding of fact which cannot now be disturbed. The article, the value of which was in dispute, was in the possession of the defendants and they never produced it. The plaintiff could not call upon them to produce it because it was their case that it had previously been broken up and divided by parts among the various *Pariwals*. It was almost impossible for the plaintiff to produce better evidence of identification than the statement of Thakur Gobind Singh, the A. D. C. to the Raja pilgrim. He gave evidence to the effect that the value of the article was Rs. 750 and he based his belief on the fact that this article had been valued by a Benares jeweller at that figure. In our opinion, in the absence of the article itself and any better evidence available, the courts below were justified in accepting that evidence as proving its true value. We are unable to hold that this evidence under the circumstances was inadmissible. The result, therefore, is that this appeal is without force and is hereby dismissed with costs.

Appeal dismissed.

Before Mr. Justice Kanhaiya Lal and Mr. Justice Sulaiman.

BALKISHAN (DEFENDANT) *v.* RAGHUBAR DAYAL (PLAINTIFF).*

Civil Procedure Code, order IX, rule 9—Suit to eject defendant as tenant—Second suit to eject defendant as licensee who had denied plaintiff's title—Second suit not barred—Cause of action.

Held that the failure of a suit to eject the defendant as a tenant who had refused to quit in spite of notice would not bar a subsequent suit based on the grounds that the possession of the defendant was permissive and that in the previous suit he had denied the title of the plaintiff to the premises from which it was sought to eject him. *Hari Kishan v. Baldeo Das* (1), declining to follow *Iqbal Ghazi v. Muzammil Hasan* (2) and *Gobind Chunder Addya v. Mohini Bullubh* (3), referred to.

THE facts of this case are fully stated in the judgment of the Court.

Munshi *Panna Lal*, for the appellant.

Maulvi *Iqbal Ahmad*, for the respondent.

* Second Appeal No. 1650 of 1921, from a decree of K. A. H. Sams, District Judge of Aligarh, dated the 7th of April, 1921, confirming a decree of Ali Ahmad, Subordinate Judge of Aligarh, dated the 14th of December, 1920.

(1) (1901) I. L. R., 24 All., 90.
(2) (1903) I. L. R., 25 All., 256.
(3) (1882) I. L. R., 9 Calc., 426.

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BALKISHAN v. RAGHUBAR DAYAL.

KANHAIYA LAL and SULAIMAN, JJ.: The dispute in this appeal relates to a certain house and a shop standing in Hathras city. They practically formed one building and belonged to Jamna Das, who on the 4th of June, 1901, made a gift thereof in favour of the plaintiff. Jamna Das died in Sambat 1961. Shortly afterwards the plaintiff hypothecated the said house including the shop, by way of a simple mortgage in favour of Makhan Lal for a sum of Rs. 1001. The allegation of the plaintiff was that that mortgage was executed for the benefit of Bhola Nath who had borrowed the money, and that about two years later Bhola Nath took possession of the mortgaged property on an agreement to pay rent at Rs. 2 per mensem, out of which Rs. 1 per mensem was to be credited in payment of interest due on the mortgage and the balance in payment of the principal due thereon.

The plaintiff goes on to say that in default of such arrangement a suit was brought by Makhan Lal for recovery of the money due on the mortgage, and a decree was eventually obtained on the 24th of August, 1916, which the plaintiff had ultimately to satisfy. The plaintiff next brought a suit against Balkishan, the son of Bhola Nath, for possession of the said house on an allegation that he was in occupation thereof as a tenant and was refusing to vacate the same in spite of notice. There was also a claim laid for damages on account of certain materials said to have been removed by Balkishan. That suit was referred to arbitration, but the plaintiff did not appear before the arbitrator, who consequently reported that the suit ought to fail for default of the plaintiff. The defendant was present before the arbitrator to prosecute his defence. The court before which the suit was pending dismissed the suit for default, acting under the provisions of order IX, rule 8, of the Code of Civil Procedure.

The present suit has been filed by the same plaintiff for the recovery of possession of the same property. The allegation now made is that Bhola Nath had been put in possession of the house in lieu of the principal and interest payable to him under the mortgage of the 13th of August, 1904; that Bhola Nath was succeeded by Balkishan and that Balkishan had wrongfully denied in the previous suit that he was a tenant. The date of the denial of the title of the plaintiff by Balkishan in the previous suit has been treated as the cause of action for the present suit. The defendant Balkishan denied the title of

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the plaintiff, and pleaded that he had been in adverse possession of the disputed property. He also denied that Bhola Nath had been in occupation of the said property as a tenant and alleged that the suit was without any cause of action and not maintainable.

The court of first instance found that the plaintiff was the owner of the disputed property and that Bhola Nath was occupying the same as a tenant under an arrangement that the rent was to be credited in satisfaction of the money due on the mortgage of the 13th of August, 1904. It was further found that the dismissal of the previous suit did not bar the institution of the present one because the cause of action for the present suit was not the same as that on which the previous suit was instituted. The lower appellate court was not satisfied that Bhola Nath had taken the house on an agreement to pay rent in the manner alleged by the plaintiff, but it was of opinion that the possession of Bhola Nath, and after him of Balkishan, was in any case permissive and that the plaintiff was entitled to eject the defendant from the disputed property.

It is urged on behalf of the defendant appellant that the claim is barred by limitation, because the defendant was in adverse possession of the disputed property, and it is also contended that the dismissal of the previous suit operates as a bar to the maintenance of the present one. In regard to the former, the findings of the courts below is conclusive. The court of first instance was of opinion that the agreement on which the plaintiff had relied was proved, and though the lower appellate court did not agree with that conclusion, it finding that the possession of Bhola Nath, and after him of the defendant, was permissive, is sufficient to dispose of the contention that the possession of either of them could be adverse to the plaintiff.

The learned counsel for the defendant appellant has referred to the decision in *Hari Khan* v. *Baldeo Das* (1). But in that case the plaintiff had failed to establish the tenancy and no licence or permission to occupy the disputed property had been proved. On the other hand, in *Hafiz Ghani* v. *Musammat Babu* (2), it was held that where a suit was brought against a person, described to be a tenant, for possession of the leasehold property and the defendant had denied the

(1) (1901) I. L. R., 23 All., 90.
(2) (1902) I. L. R., 25 All., 286.

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tenancy alleged by the plaintiff, and asserted that he had been in adverse possession for a period of seventeen years, and the said tenancy was found to be not established, nevertheless that was not considered sufficient to preclude the plaintiff from asserting and establishing that the possession of the defendant was permissive, and he was granted relief on that basis.

The second contention is equally futile, for order IX, rule 9, of the Code of Civil Procedure does not preclude the plaintiff, after his suit has been dismissed on one cause of action, from bringing another suit on another cause of action. The cause of action in the previous suit was the refusal of Balkishan to vacate the premises after he had been served with a notice of ejectment. The cause of action in the present suit is the denial of title. As held in *Gobind Chunder Addya* v. *Afzul Rahbani* (1), the operation of section 103 of the old Code of Civil Procedure (corresponding to order IX, rule 9, of the present Code) is confined to those cases only where a second suit is brought for the same object and on the same cause of action as the suit which was dismissed.

The appeal therefore fails and is dismissed with costs.

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July, 13.

Before Sir Grimwood Mears, Knight, Chief Justice and Mr. Justice Piggott.

SHEO CHARAN (PLAINTIFF) v. PANNA LAL AND OTHERS (DEFENDANTS).*

Lambardar—*Suit by* lambardar *to recover dues—Agreement at settlement that no such dues should be payable—Agreement not repeated at next settlement—Rules framed by Board of Revenue as to remuneration of* lambardar.

At a settlement in 1285 F. it was agreed as between the *lambardar* and the co-sharers that no remuneration, by way of *lambardari* dues, was payable. Subsequently the Board of Revenue framed certain rules as to the payment of *lambardari* dues, one of which was "(2) Where no amount is so payable (*i.e.*, by virtue of any agreement), or where, upon the expiry of the current settlement of a temporarily settled *mahal*, the agreement is repudiated by either or both the parties thereto, the *lambardar* will be entitled to receive from the co-sharers whom he represents 5 per cent. upon the land revenue payable by them in respect of their shares, or such less amount as may be agreed upon between him and them." At the next settlement in 1312 F. no agreement at all was recorded as to the payment of *lambardari* dues.

Held on suit by the *lambardar* to recover his dues according to the scale laid down by the Board of Revenue, that, even if the effect of the Board's rules was not to bar an agreement by which nothing at all should be paid to the *lambardar*, the agreement set up by the defendants did not enure for longer than the term of the settlement at which it was recorded, and as it had not been renewed at the next settlement the rules took effect and the *lambardar* was entitled to remuneration according to their terms.

THIS was a suit brought by a *lambardar* against the co-sharers for the recovery of *lambardari* dues. The defence

* Appeal No. 139 of 1921, under section 10 of the Letters Patent.

(1) (1882) I. L. R., 9 Calc., 426.

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was that the co-sharers made collections themselves and paid revenue of their respective shares and that under the terms of the *wajib-ul-arz* of 1285 F. the *lambardar* of the village was not entitled to any remuneration. The court of first instance held that as there was no entry of any agreement as to the payment of *lambardari* dues in the *wajib-ul-arz* of the recent settlement of 1312 F., the plaintiff was entitled to receive from the defendants 5 per cent. on the Government revenue under rule 23 of the rules framed by the Board of Revenue, dated the 24th of February, 1902, and decreed the suit. On appeal by the defendants the District Judge allowed the appeal and dismissed the suit, holding that the agreement recorded in the *wajib-ul-arz* of 1285 F., not having been repudiated in the settlement of 1312 F., still held good and the *lambardar* was, therefore, not entitled to any remuneration. On second appeal a single Judge of the Court agreed with the District Judge and confirmed his decree. The plaintiff filed this appeal under the Letters Patent.

Mr. *A. P. Dube*, for the appellant, submitted that the object of the rules framed by the Board of Revenue was that a *lambardar* should get some remuneration for the duties he performed. It was the *lambardar* who was responsible to the Government for the payment of revenue, and unless there was some incentive, no person would like to take upon himself the onerous duties of a *lambardar* and the management of the village would suffer. Rule 22 provided that where a certain amount of remuneration had been fixed by agreement, the *lambardar* was entitled to that much only and no more. But in a case where there was no agreement, or the agreement was that nothing would be paid to the *lambardar*, rule 23 would apply and he would be entitled to the maximum remuneration fixed by the Board, i.e., 5 per cent. on the Government revenue. The expression "where no amount is so payable," in rule 23, meant where nothing was payable to the *lambardar* under an agreement. In the present case the agreement being that the *lambardar* would not get any remuneration, the plaintiff was entitled to *lambardari* fees at 5 per cent. on the revenue. To make such an agreement binding on the *lambardar* would be defeating the very purpose of the new rules framed by the Board of Revenue. He relied on *Genda Kuar* v. *Piari Lal* (1) and *Bhoj Raj* v. *Sri Gopal* (2).

(1) Weekly Notes, 1896, p. 175.
(2) (1916) Indian Cases, 647.

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Dr. *Kailas Nath Katju*, for the respondents, contended that rule 23 would apply only when there was no agreement as to the payment of *lambardari* dues. Under rule 22 any agreement regarding a *lambardar's* remuneration was binding upon the co-sharers as well as the *land-lord*, no matter whether the amount fixed may be 1 per cent., 2 per cent. or *nil*. It was only when there was no agreement one way or the other that a *lambardar* was entitled to get 5 per cent. on revenue as his *lambardari* dues. To hold that though an agreement whereby an infinitesimally small amount was fixed as remuneration would be binding on the *lambardar*, nevertheless an agreement where nothing was payable as such would not be binding upon him and he would be entitled to the maximum *lambardari* dues, would be reducing the whole thing to an absurdity. It was so very easy to fix a nominal sum by agreement and thus defeat the object which the Board was said to have had in view. The Board would never have intended to interfere with any agreement which the co-sharers may like to enter into. The expression "where no amount is so payable" meant where no agreement existed as regards the remuneration of a *lambardar*. If there was any ambiguity about that expression, then such an interpretation should be put upon it as might be reasonable.

Mr. *A. P. Dube*, was not called upon to reply.

MEARS, C. J. and PIGGOTT, J.:—This was a suit in which the *lambardar* of a certain village claimed from the entire body of co-sharers the remuneration, at the rate of 5 per cent. on the revenue payable in respect of their shares, to which he was entitled under the provisions of section 144 of the United Provinces Land Revenue Act, Local Act No. III of 1901, subject to rules properly made by the Board of Revenue under section 234 of the said Act. The rules which were so made have been laid before us, and they seem on their wording clear and simple enough. They are reproduced at page 192 and the following pages of Dr. M. L. Agarwala's valuable Commentary on the United Provinces Land Revenue Act, edition of 1919. They appear to have been promulgated in the year 1902. By paragraph 22 of the said rules, where there was in existence on the date on which those rules came into force an agreement between the *lambardar* and the co-sharers fixing the amount which the *lambardar*, by virtue of his appointment, was entitled to receive from the co-sharers

by way of remuneration, such amount was to constitute to be payable, subject to the rule which immediately follows. That rule is in the following words:—

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(No. 23) "Where no amount is so payable, or where, upon the expiry of the current settlement, it is temporarily settled *mokasi*, the agreement is repudiated by either or both the parties thereto, the *lambardar* will be entitled to receive from the co-sharers who are in possession of land the land revenue payable by them in respect of their shares, or such lesser amount as may be agreed upon between him and them."

On its plain wording the rule seems to mean that the *lambardar* is always to get some remuneration, either a remuneration the amount of which is to be fixed by agreement between the co-parcenary body generally, or the 5 per cent. prescribed by the rule itself. This is the plain effect of the words "when no amount is so payable."

On the finding which has been returned, and upon which the decision of the learned Judge of this Court is based, there is no amount payable to the plaintiff *lambardar* by agreement. The alternative seems to be for the co-sharers, unless they can persuade the *lambardar* to come to an agreement, or can come to an agreement amongst themselves before the next *lambardar* is appointed and resume the appointment of a *lambardar* willing to come to terms, will have to continue to pay the 5 per cent. on the land revenue prescribed by the rules. This was the view taken by the Assistant Collector who tried this suit in the first instance. The learned District Judge in appeal, and a learned Judge of this Court in second appeal, have construed the words at the beginning of rule No. 23, above quoted, as if they meant "where no agreement has been come to as to the amount payable to the *lambardar*." Reading the rule in this way, they have held that the parties to this litigation are governed by an agreement to the effect that nothing is to be paid to the *lambardar*. The criticism which occurs to one on the interpretation of the rule is that, if the Board of Revenue had intended the effect to be what the lower appellate court and the learned Judge of this Court have held, it would have been quite easy to say so. As they stand, the words, "where no amount is so payable," do mean that the provisions which follow in the same rule are to come into force in all cases where there is not some ascertainable amount payable to the *lambardar* by virtue of an agreement.

The rule says "where no remuneration is payable to the *lambardar* in virtue of any agreement." These defendants reply "In the present case there is an agreement in virtue

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of which no remuneration is payable." On the plain wording of the rule, is it not correct to say to the defendants :—" Your case falls within the scope of the rule; it is one of the cases in which the rule was intended to operate?"

The contention which found favour in the courts below seems to have been, in substance, that the Board of Revenue could not have intended the rule to mean what its words apparently say, because of certain consequences which would follow upon any attempt to apply the rule according to its apparent meaning. The contention is that it would be easy for the co-sharers at any settlement to agree amongst themselves that the *lambardar* shall receive a merely nominal remuneration. This is perfectly true; but it by no means follows that the Board of Revenue when it brought this rule into force did not intend to strike at all existing agreements under which the remuneration of the *lambardari* was to be *nil*, and so to bring pressure to bear upon the co-sharers to come to reasonable terms, subject only to the condition that the *lambardar* was to get some remuneration in every case. Revenue Officers who have had experience of the extreme difficulty sometimes met with in getting any co-sharer to accept the office of *lambardar* in particular villages where the great bulk of the cultivated land consists of *sir* and *khudkasht*, or where an informal partition has in effect divided up all the lands of the village, so that each individual co-sharer practically collects rent equivalent to his own rateable share in the net profits of the *mahal*, will readily understand that the Board of Revenue may have had a deliberate purpose to serve in insisting that in all cases the *lambardar* should receive at least some remuneration. When all is said and done, even when there are no rents for the *lambardar* to collect as such, and where the co-sharers concerned take it upon themselves to pay in their individual quotas of land revenue at the Tahsil, instead of making payment through the *lambardar* (though as a matter of fact such cases must be rare, for it is distinctly against the interest of sound administration that revenue should be collected in small fractions from a number of co-sharers, rather than from the duly appointed *lambardar* of the *mahal*), even then the fact would remain that the *lambardar* by virtue of his office would be the first person against whom coercive process, by way of arrest or otherwise, would issue in the event of any default in the payment of land revenue. In determining this appeal,

therefore, we are content to base our decision mainly on the wording of the rule of the Board of Revenue which we have quoted above. The particular facts of this case, however, are deserving of attention. At the settlement of 1285 F., before the Board of Revenue had issued the rule in question, there was an agreement between the co-sharers that the *lambardar* should receive no remuneration. At a subsequent settlement (in 1312 F.), the plaintiff contends, this agreement was expressly abrogated. He has failed to prove that it was so abrogated; but, on the other hand, there is no evidence that it was re-affirmed. Our opinion is that, if the co-sharers as a body desired to contract themselves out of the scope of the Board of Revenue's rule, they ought to have agreed upon some nominal remuneration for the *lambardar*. The effect of the rule is to place the latter in a strong position; he can bargain with the co-sharers for some reasonable remuneration, under threat of standing upon his extreme rights and claiming his full 5 per cent. on the land revenue. If the agreement of 1285 F. had been, expressly and in terms, renewed in 1312 F., we might perhaps have hesitated as to our decision, though still holding that the plaintiff's claim was within the letter of the rule. As the case stands, we are clearly of opinion that the agreement relied upon by the defendants, even if it survived the enactment of the Board of Revenue's rules of 1902 (which we doubt), came to an end automatically at the close of the settlement for which it was made and could have no effect on the rights of the *lambardar* thereafter at any rate, unless it were proved that it was expressly renewed.

We, therefore, allow this appeal, set aside the decree of the single Judge of this Court and that of the District Judge, and restore the decree of the court of first instance. The plaintiff will get his costs throughout, including those of both hearings in this Court.

Appeal allowed.

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July, 17.

Before Mr. Justice Stuart and Mr. Justice Kanhaiya Lal.

KISHEN SINGH AND OTHERS (OBJECTORS) v. CHHAJU SINGH AND OTHERS (DECREE-HOLDERS).*

Hindu Law—Joint Hindu family—Liability of sons for father's debts—Execution of decree.

The pious obligation of a Hindu [illegible] not arise until after the death of the latter.

A, B and *C* (Hindus) took a [illegible] secure due payment of the rent by the [illegible] lessor. The lease money not [illegible] their negligence and obtained a [illegible] and there stood *A* and his son and [illegible] it was found that [illegible] binding on the family [illegible] and grandsons being [illegible] in execution of their decree [illegible] not merely the interest [illegible]

Held, on objection taken [illegible] open to the creditors [illegible] against the objectors, to recover the debt represented by [illegible] the mortgage was alive, from the shares of [illegible] had been exempted from liability, out of the [illegible] which had been declared unencumbered.

Sukh Ram Chandra v. Bhup Singh [illegible] *Singh* (2), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Nihal Chand*, for the appellants.

Dr. *M. L. Agarwala* and Babu *Piari Lal Banerji*, for the respondents.

STUART and KANHAIYA LAL, JJ.: This appeal arises out of an execution proceeding and the question for consideration is whether the property in dispute was liable to attachment and sale in execution of a decree obtained against Kallu Singh personally. The objectors are the son and grandsons of Kallu Singh, who had been exempted by the decree from liability. They contest the right of the decree-holders to attach the family property.

It appears that Kallu Singh, Nathu Singh and Maru Singh took a lease of certain property from Pirthi Singh and executed a mortgage to secure the payment of the lease money. The mortgage purported to hypothecate certain properties belonging to the lessees. As the lease money was not paid, a suit was filed by the lessor for the recovery of the money due to him against Kallu Singh and the present respondent, who [illegible]

* Second Appeal No. 1862 of 1921, from a decree of [illegible] District Judge of Saharanpur, dated the 25th of November, 1921, [illegible] a decree of Raghunath Prasad, subordinate judge of Saharanpur, dated the 6th of September, 1917.

(1) (1917) I. L. R., 39 All., 457.
(2) (1922) I. L. R., 44 All., 368.

the legal representatives of the other lessees. The present respondents paid the entire decretal money and saved their property and the property of Kallu Singh from sale.

They then filed a suit for the recovery of the share of the lease money, payable by Kallu Singh, making the son and grandsons of Kallu Singh, namely the present appellants, parties to that suit. The latter contested the claim on the ground that the lease was not taken for the benefit of the family and that they were not liable to pay the money due under the decree. The finding of the court in that suit was that the lease was a speculative and risky transaction, not binding on the family. The claim of the respondents was accordingly decreed against Kallu Singh personally and the present appellants were exempted from liability.

In execution of that decree the property, which had been hypothecated by Kallu Singh for the payment of the rent secured by the lease, was attached and sought to be brought to sale in satisfaction thereof. The appellants objected to the said attachment, urging that they had already been exempted from liability under that decree; but the courts below held that by reason of the pious obligation that rested on them to pay the debts due by Kallu Singh, the decree could be executed against the entire family property.

The liability of a son or grandson to pay a debt by his ancestor, which is not tainted with immorality or was not taken for illegal purposes, cannot, however, be enforced so long as the original debtor is alive and is capable of paying his debts. According to Vrihaspati, if the father is no longer alive, the debt must be paid by his sons. Vrihaspati says: "If he who has contracted the debt, should die, or become a religious ascetic, or remain abroad for twenty years, the debt shall be discharged by his sons or grandsons, but not by remoter descendants against their will." A similar injunction is laid down by Narada, who declares: "After the father's death his sons, whether divided or joint, must discharge his debt in proportion to their shares." So says Yajnavalkya:—"If a father has gone abroad or died or is subdued by calamity, his debt shall be paid by his sons and grandsons. On their denial the debt must be proved by witnesses." Commenting on this passage, the author of the Mitakshara observes:—"If the father, without paying the debt which is due, dies or goes to a distant country, or is afflicted with an incurable disease and

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obligation and observed: "While the father remains in life, the attempt to affect the sons' and grandsons' shares in the property in respect merely of their pious obligation to pay off their father's debts, and not in respect of the debt having been truly incurred for the interest of the estate itself which they with their father jointly own, must fail: and the simplest of all reasons may be assigned for this, namely that before the father's death he may pay off the debt, or after his death, there may be ample personal estate, belonging to the father himself, out of which the debt may be discharged."

If the attempt to enforce a mortgage on the theory of pious obligation fails, the right to attach the family property during the lifetime of the father on the strength of that pious obligation can be still less recognized, because if no pious obligation exists, it must be so in affect to uphold the one as to support the other.

In *Jai Narain* v. *Jeoran Das* (1) and *Ram Saran* v. *Hari Ram* (2) it was held in regard to certain antecedent debts, on the facts found in the respective transaction, that there was no pious obligation on the sons or grandsons of the transferor to pay those debts, while their father was alive. In *Bhanta Singh* v. *Dip Singh* (3) it was held that where there was no suggestion that the debt was incurred for the benefit of the family, it was only the father's share, and not the entire family property inclusive of the share of the sons, that could be sold in execution of a personal decree against the father while the father was alive. In *Mama Lal* v. *Bhagwan Din* and *Shradha Singh* v. *Bhagwan Singh* (4) the same view was adopted.

The lower appellate court relies on the decision in *Sripat Singh* v. *Tapeshwari* (5); but that was a case in which the property had passed out of the family by execution sale held in satisfaction of a debt which was found to be binding on the family, and different considerations were therefore applicable. It cites a passage from that judgment, which forms a part of the statement of the grounds of action rather than of decision, and the question now at issue was not in issue there. A

(1) (1923) 20 Indian Cases, 914.
(2) (1919) I. L. R., 41 All., 539.
(3) (1917) 39 Indian Cases, 311.
(4) (1921) I. L. R., 43 All., 496.
(5) (1916) L. R., 44 I. A., 1.

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reference has also been made to the decision in *Gokaldas* v. *Ghana Shyam Das* (1) and *Hari Kishan* v. *Sadhu Singh* (2), but in the former case the property was sold by the father by sale, and in the latter case the debt was incurred for the benefit of the family.

The decision in *Muddun Thakur Pershad* v. *Isseree* (3), *Pedda Venkanna* v. *Subbarayudu* (4), *Venkata Narasimha Appa Rao* v. *Ramanadham* (5) and *Devaraya Mudaliar* v. *Ganesh Ayyan* (6) are also in principle to the same effect, along with a decision of this Court in *Mohan Lal* v. *Bala Prasad* (Ex. F. A. No. 188 of 1920). But all these decisions proceed on the principle that the decision of the Judicial Committee in *Sahu Ram Chandra* v. *Balmp Singh* (7) could not be deemed to have overruled the previous decisions of their Lordships in the earlier cases and in two of them the learned Judges profess to abide by the earlier decisions till there was some further pronouncement on the part of their Lordships. It is necessary here to observe that the earlier cases were rather cases in which the property had passed out of the family by sale, to which different considerations applied, or cases in which an attempt had been made to enforce a mortgage after the death of the mortgagor, or on like some.

In *Girdharee Lall* v. *Kantoo Lall* (8) the property had already passed out of the family for a consideration, the bulk of which had been taken for a valid necessity. In *Mt. Umrao Kuar* v. *Thakur Das* (9) the Judicial Committee of the Privy Council pointed out that a distinction had always been taken in Hindu Law between the right of a son to sue for the entirety of the joint estate was held to be liable for a father's debt and the question how far the son could be precluded by proceedings taken by or against the father at least from disputing that liability, and they declared that the distinction had for some time established the principle that the sons would not set up their rights against their father's alienation for an antecedent debt or against his creditor's remedies for those debts, if not

(1) (1917) 47 Indian Cases, 312
(2) (1920) I. L. R., 22 All., 403
(3) (1926) I. L. R., 30 Calc., 341
(4) (1917) I. L. R., 41 Mad., 136.
(5) (1918) I. L. R., 42 Bom., 612.
(6) (1917) I. L. R., 39 All., 457.
(7) (1874) L. R., 1 I. A., 321
(8) (1865) L. R., 13 I. A., 1.

tainted with immorality. In *Bhagbut Pershad* v. *Musumat Girja Kaur* (1), *Meenakshi Naidu* v. *Immudi Kanaka Ramaya Kounden* (2), and *Rai Baba Mahabir Pershad* v. *Rai Markunda Nath Sahai* (3) the ancestral property had similarly passed out of the family by virtue of execution sales, the validity of which could not have been questioned except on the ground that the debts in satisfaction of which the sales took place had been incurred for illegal or immoral purposes. It is unnecessary to refer to the decisions in *Karan Singh* v. *Bhup Singh* (4), *Babu Singh* v. *Bihari Lal* (5), and *Indar Pal* v. *The Imperial Bank* (6), because the authority of those decisions has been shaken by the later decision of their Lordships of the Privy Council in *Sahu Ram Chandra* v. *Bhup Singh* (7).

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If a further pronouncement was needed, it is supplied by the recent decision of their Lordships in *Chet Ram* v. *Ram Singh* (8) where the view taken by this Court in *Ram Singh* v. *Chet Ram* (9) on this matter has been affirmed. In that case a mortgage of the family property made by a grandfather was followed by a sale by him of the equity of redemption to the mortgagee three years later, which was attested by his sons, and on the validity of the mortgage and the subsequent sale being questioned by the grandsons of the mortgagor or vendor, their Lordships repelled the contention that although by the rules of the Mitakshara a mortgage was at its date an invalid deed in so far as purporting to encumber the joint family property, yet when it purported to be the consideration of a sale, it became then a just and legal consideration on the principle of "*antecedent debt.*" They then proceeded to consider whether by reason of the doctrine of pious obligation the liability of the family property could be enforced, and after referring to their decision in *Sahu Ram Chandra* v. *Bhup Singh* (7), in which a similar appeal to the pious obligation doctrine was made during the father's life time, observed that the doctrine could not be invoked against grandsons in the life time of sons. The doctrine of antecedent debt, resting as it does

(1) (1888) I. L. R., 15 I. A., 99.
(2) (1913) I. L. R., 36 I. A., 1.
(3) (1914) I. L. R., 37 I. A., 11.
(4) (1904) I. L. R., 27 All., 16.
(5) (1904) I. L. R., 30 All., 150.
(6) (1914) I. L. R., 37 All., 214.
(7) (1917) I. L. R., 39 All., 497.
(8) (1922) I. L. R., 44 All., 308.
(9) (1919) I. L. R., 41 All., 529.

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on the theory of pious obligation [illegible] for the protection of third parties, who [illegible] faith in the family property, and [illegible] for validating a sale effected in [illegible] mortgage in [illegible] whose mortgage [illegible] debt [illegible] above from the [illegible] from liability, out of [illegible] have been declared [illegible] payment of which [illegible] no [illegible] repayment [illegible] doctrine of pious obligation [illegible] mortgage [illegible] to enforce the [illegible] interest of the [illegible] repayment.

We allow the appeal accordingly, [illegible] pressed by the court below, [illegible] proceed against the [illegible] property, such charge being [illegible] and sought [illegible] the decree [illegible] tion can proceed against the [illegible] of Kishen Singh.

1923 April 14.

APPEAL FROM ORIGINAL DECREE [illegible]

Held that section 47 [illegible] application by judgment-debtor [illegible] restitution of property purchased [illegible] that the decree-holder, though entitled [illegible] the application had so far [illegible] by their decree. *Phagwati v. Bisesari Lal* [illegible].

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Gulzari Lal*, for the appellant.

Babu *Lalit Mohan Banerji*, for the respondents.

* Second Appeal No. [illegible] of [illegible] Munshi, District Judge of Shahjahanpur, [illegible] ing a decree of Babu Lalta Prasad, Munsif of Shahjahanpur, dated the 23rd of May, 1921.

(1) (1886) I. L. R., 31 All., 82.

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MUNNA v. THE COLLECTOR OF SHAHJAHANPUR.

STUART and KANHAIYA LAL, JJ.:—This appeal arises out of execution proceedings. It appears that a mortgage was made on the 5th of August, 1882, by Nirmal Singh, the predecessor in interest of the judgment-debtors respondents, hypothecating 2½ biswa of mahal No. 3 in Bajhera Bhagwanpur in favour of Basant Rai, the father of the decree-holders appellants. In the settlement of 1889 mahals Nos. 2 and 3 were amalgamated and formed into a single mahal. The 2½ biswa share of the mahal No. 3, which was mortgaged with Basant Rai, corresponds with 3 bighas 18 biswansis and odd of the amalgamated mahal No. 2.

Subsequently a suit was filed by the grandsons of Musammat Umed Kunwar for the recovery of the entire old mahal No. 3 and a decree was obtained, in pursuance of which they obtained mutation of names in their favour against Jit Singh, the son of Nirmal Singh. Later on the mortgagee filed a suit on his mortgage and got a decree against the judgment-debtors respondents, in execution of which the 2½ biswa share of old mahal No. 3, which was described as corresponding with 3 bighas 18 biswansis and odd of the new mahal No. 2, was brought to sale and was purchased by the decree-holders themselves. Subsequently they obtained possession over the purchased property and got mutation of names effected in the revenue papers by the removal of the names of the judgment-debtors respondents in respect of that share. The present application was then filed by the judgment-debtors, who asserted that the auction purchasers had taken possession of their property which was outside the mortgage. The courts below found that the auction purchasers had taken possession of the property of the judgment debtors outside the mortgage, and holding that the objection was entertainable under section 47 of the Code of Civil Procedure, directed restitution.

On behalf of the auction purchasers it is contended that the judgment-debtors cannot go behind the decree which was passed against them, and that in any case their objection ought not to have been entertained under section 47 of the Code of Civil Procedure. It appears that the judgment-debtors held a share in old mahal No. 2, which was not mortgaged. Order XXI, rule 100, has no application because that rule is confined in its operation to persons who are not judgment-debtors and have been dispossessed of the property claimed by them. The judgment-debtors here complain that

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they have been dispossessed of their property [illegible] ed to old mahal No. 2 and was not covered by [illegible] question is, is this objection maintainable under section 47 of the Code of Civil Procedure? If the decree had been one for possession, the question would have been answered in the affirmative. In fact this was so held in *Abdul Karim v. Islam-un-nissa Bibi* (1). But in the present case possession of the disputed property has been obtained by a person who is an auction purchaser of that property in execution of a decree obtained on foot of a mortgage made by the father of the judgment debtor. An auction purchaser might be treated as a representative in the sense of the decree-holder and in such circumstances [illegible] and it is questionable whether a dispute about the identity of the property sold between a judgment-debtor and the right of the judgment-debtor [illegible] tors, can be entertained under section 47 of the Code of Civil Procedure. In *Bhagwati v. Banwari Lal* (2) a suit by an auction [illegible] purchased by him [illegible] maintainable [illegible] Procedure would not bar [illegible] decision is applicable to the present case and we are not prepared to hold that the objection in the present case was rightly entertained. [illegible] matters raised in the present [illegible] debtors to obtain any [illegible] way of a regular suit.

We allow the appeal [illegible] courts below, dismiss the application [illegible] hitherto. The judgment-debtor respondent will pay his own costs throughout.

Appeal allowed.

(1) (1892) I. L. R. 15 All. 101.
(2) (1892) I. L. R. 14 All. 494.

Before Mr. Justice Ryves and Mr. Justice Stuart. 1922

PARSOTAM DAS KOLAPURI AND OTHERS (DEFENDANTS) v. LACHMI NARAIN AND OTHERS (PLAINTIFFS).*

Contribution—Suit brought by two sets of plaintiffs jointly—Suit dismissed with decree for costs against both sets—Decree executed against one set only—Suit for contribution maintainable by the other.

Two branches of a Hindu family combined to bring a suit against the third branch, and lost, the consequence being a decree against the plaintiffs for costs in both the original and appellate courts. The defendants executed their decree for costs against one set of plaintiffs only and these then sued the other set for contribution.

Held that there was no *a priori* objection to such a suit, and the plaintiffs were entitled to a decree.

Ram Sarup v. *Baijnath* (1), followed. *Kishna Ram* v. *Rajmini Sevak Singh* (2) and *Shakul Kameed Alim Sahib* v. *Syed Ebrahim Sahib* (3), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Piari Lal Banerji* and Munshi *Harnandan Prasad*, for the appellants.

Maulvi *Iqbal Ahmad*, for the respondents.

RYVES, J.: The facts of this case are simple. Jamna Prasad, Gharib Das and Khedu Ram were three separate Hindu brothers. The sons and grandsons of Jamna Prasad (now plaintiffs respondents) and the sons of Gharib Das (now defendants appellants), combined together to bring a suit against the sons of Khedu Ram. They were unsuccessful both in the trial court and on appeal in this Court, and their suit and appeal were dismissed with costs.

Shortly afterwards, dissensions arose between the plaintiffs and the defendants, and the decree-holders (defendants in that suit) siding with the present defendants, recovered the whole of the costs from the plaintiffs.

The plaintiffs now sue to recover from the defendant half of the costs, the whole of which they had to pay. The main defence was that the defendants had paid their half here. This was disbelieved by both the lower courts, who decreed the suit.

In the court below, although the plea was not taken specifically in the written statement, it was allowed to be argued that the suit was not maintainable on the ground that there is no right of contribution between joint tort-feasors. This

* Second Appeal No. 705 of 1921, from a decree of A. G. P. Pollen, District Judge of Benares, dated the 2nd of February, 1921, confirming a decree of Sayed Ibn Ali, Munsif of Jaunpur, dated the 23rd of July, 1920.

(1) (1924) I. L. R., 46 All., 77.

(2) (1917) I. L. R., 9 All., 22.

(3) (1902) I. L. R., 26 Mad., 373.

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plea was based on the well-known [illegible] *Niran* (1), decided as long ago as 1789 [illegible] The rule broadly laid down in [illegible] subsequent decisions in England, *viz.*, [illegible] 12th Edn., Vol. I, pp. 135 to 137. [illegible] sidered in *Phin* [illegible] the Houses of Lords [illegible] [illegible] [illegible] Scotland for [illegible] for contribution of half the losses and half the costs. The trial court dismissed the suit on the ground that the Shipping Company "being joint wrong doers with Parbhu, had no ground for relief." On appeal this judgment was set aside and the Company's suit was decreed in full. This decree was affirmed by the House of Lords, on the ground that the Company's claim rested [illegible]

The words which I have italicised are taken from the headnote and appear to be [illegible] observations of Lord WATSON, Lord HALSBURY, while concurring in dismissing the appeal, seems to have doubted "whether *in England* the [illegible] action into a judgment (in India, a decree) would prevent the application of the principle of *Merryweather* v. *Nixan*," although he concurred generally in Lord HERSCHELL's opinion of that case.

The appellants' case was argued mainly on the ground that *Merryweather* v. *Nixan* (1) was conclusive. Lord HERSCHELL said: "It is not founded on any principle of justice or equity or even of public policy which justifies its extension to the jurisprudence of other countries," although he thought it was too late to question it in England.

It seems to me, therefore, very doubtful whether we should apply it in India. The same view was suggested in

(1) (1789) 8 T. R., 186.
(2) (1894) A. C., 318.

the case of Nihal Singh v. *Collector of Bulandshahr* (1). It is only in fact laid down in the case of *Gokaldas Prasad* v. *Darbhanga Thakur* (2), that the rule as to the sum modified is applicable in this country. It is, however, unnecessary for us to decide the point, because it has been held by the Courts below as a fact that the parties were not [illegible]. The District Judge finds that they were simply "amicus curiæ" litigants, not criminals."

There remains, however, a still broader question which has been argued before us at considerable length. It is urged that an unsuccessful party cannot, at all, enforce contribution by suit against another unsuccessful party, and this is said to be the rule prevailing in England, and is supported by the case of *Dearsly* v. *Hill Howard* (3), in which Fry, J., said: "I shall follow the dictum which has been cited to me from the Court of Appeal in *Reid and Personal Advance Company* v. *McCarthy* (4) and hold that a defendant cannot proceed against a co-defendant for contribution in respect of costs to which both are equally liable." That dictum appears in the judgment of Sir Charles Hall, at page 268 of the same volume, and is in the following terms: "This is a common law action and at common law there is no such thing as apportionment of costs. There is an apportionment of costs in equity, but it is of quite a different kind: it is an apportionment of costs between different claims."

Reference is also made to the case of *Wilson* v. *Thomson* (5) in which Sir Charles Hall, V. C., said: "The plaintiff must have costs against both the defendants, but I consider that Timms is the person whose misconduct has brought about this suit, and I should like to make him bear the costs as between himself and Thomson, if I have jurisdiction to do so. It has been suggested that I should order the plaintiff to pay Thomson's costs, and give the plaintiff those costs against Timms, but I will not inflict the plaintiff in that way. He may never be able to recover anything from Timms. Besides, I have held the plaintiff to be entitled to costs against Thomson as well as Timms. Relief cannot ordinarily be given as between co-defendants. I think, however, that I have jurisdiction to declare that costs which the plaintiff has

(1) (1916) I. L. R., 38 All., 274.
(2) (1918) I. L. R., [illegible].
(3) (1887) L. R., 18 Ch. Div., [illegible].
(4) (1886) L. R., 18 Q. B. D., [illegible].
(5) (1877) L. R., 6 Eq. [illegible].

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recover from Thomson, shall be repaid to [illegible] by Timms." Having regard to this rubric, it is [illegible] that unless the court directs, *in the suit itself*, how the costs are to be paid by the parties *inter se*, they cannot [illegible] by a separate suit.

Various cases from the Indian Law Reports have been cited. *Fakire* v. *Tasaduq Hussain* (1) was a suit for contribution by one defendant against his co-defendants, and it was dismissed on the ground that it "lay upon the plaintiff to show that there was either some contract between him and the defendants, or some equity which created a duty on these defendants to contribute to the costs in question as between themselves." Apparently the plaintiff and defendants here were wrong doers. They were holding [illegible] to property to which the plaintiff in the former suit was entitled, and to which they (or rather, one of them [illegible]). Each was acting independently and for his own benefit, and setting up a title against the plaintiff to the former suit, was independent of, and separate from, and inconsistent with, the title set up by the other defendants. Their claims were mutually exclusive. There was no contract between them. One was not acting as the servant of the other; and there was no equity between these persons whose cases were antagonistic to each other." In connection with this remark a reliance was placed on the observations of their Lordships of the Privy Council in the case of *Hari Kishan* v. *Sheikh Hafiz* (2), where their Lordships said: "In the present appeal the defendant claimed to be allowed a proportion of the costs on the ground that the plaintiff had, of the benefit of [illegible] of the decree of the Judicial Commissioner. This is no ground for making the plaintiffs liable for any portion of these costs. The proceedings were taken by the defendant for his own benefit, and without any authority, express or implied, from the plaintiffs; and the fact that the proceedings were a benefit to the plaintiffs does not create any implied contract or give the defendant any equity to be paid a share of the costs by the plaintiffs."

The next case relied upon was the case of *Mul'a Singh* v. *Jagannath Singh* (3). That also was a suit for contribution

(1) (1897) I. L. R., 19 All., 402.
(2) (1899) I. L. R., 21 Calc., 936.
(3) (1910) I. L. R., 32 All., 251.

among co-defendants, and thus Court dismissed the suit, following the English case of *Dursely* v. *Middlewick* (1), holding that the mere fact that a joint decree was passed against all the defendants for costs did not prove conclusively that if one of those defendants paid the whole of the costs, he would have an absolute right to get contribution from his co-defendants, but that it would be necessary to prove some contract or equity between them. I confess I do not quite appreciate the *ratio decidendi*. But the facts are not fully stated. It is interesting, however, to contrast this case with the case of *Sira Panda* v. *Jujusti Panda* (2), which was quoted in argument in that case but is not referred to in the judgment. There a suit had been brought to recover a sum of money and costs jointly against two defendants. Defendant No. 1 did not defend the suit and proceedings were taken against him *ex parte*. Defendant No. 2 defended the suit unsuccessfully, and a joint decree was passed against both, which was satisfied by defendant No. 2. He then brought this suit against his co-defendant for contribution for half the amount paid by him, which included half the costs. The trial court dismissed the suit on the ground that "the present defendant had no interest in that case. The foundation of the action thus fails." This was a Small Cause Court suit and an application in civil revision was taken to the High Court and came before DAVIES, J., who reversed the trial court and decreed the suit. On appeal under the Letters Patent, BENSON and BHASHYAM AYYANGAR, JJ., dismissed the appeal. They held that the production of the judgment and the decree in the former suit, and the certificate of sale to show by the plaintiff alone, gave him a *prima facie* case, but they went on to say, "it will of course be open to the party from whom contribution is sought to show that as between the joint debtors the whole debt is not equally payable by both of them, or that he is not equally liable with the other to pay, or that both being joint tort feasors are not equally guilty, or upon public grounds the right of contribution is negatived, the suit is not maintainable." Another case which has been strongly relied upon is the case of *Punjab* v. *Pitam Singh* (3). That case, however, and the cases which have followed it, can be left out of consideration, as they have no application whatever to the present case. There, several

(1) (1881) L. R., 18 Ch. Div., 236.
(2) (1901) I. L. R., 25 Mad., 699.
(3) (1871) 6 N. W. P., H. C. R., 192.

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[illegible] were jointly liable to [illegible] creditor [illegible] and recovered it with [illegible] for contribution [illegible] liable with him [illegible] to [illegible] or defending the [illegible] plaintiff was [illegible] debt, but was [illegible] plation of the parties that it will be paid without suit. Although [illegible] not be called upon [illegible] prosecuted, they may have to contribute [illegible] under a joint liability [illegible] the debt and to [illegible] joint liability in virtue of which they are bound to contribute [illegible] respective debts of debt and [illegible] only one of several co-contractors [illegible] his co-contractors to contribute [illegible] extract from the judgment [illegible] application here.

An examination of [illegible] think that the proposition [illegible] Mr. [illegible] Bonnell, [illegible] co-debtor against [illegible] litigation, is put much too broadly, [illegible] gether inadmissible.

I have not been able to find [illegible] principle which prevents an unsuccessful party suing for contribution for costs from a co-party who has had to pay the whole of it himself. I think there must be some at any rate more or less analogous to that underlying *Merryweather v. Nixan* (1), namely, that the defending of a successful suit was in itself something in the nature of a tort. I think that must be so, because in the numerous cases which I have examined in which the question was of the right to contribution for costs in any of the various forms in which it has arisen, a reference has almost invariably been made to *Merryweather v. Nixan*.

(1) (1799) 101 R. R., 810.

However, be that as it may, I find on examination that in all those cases the question has arisen between co-defendants, and the only rule of practice in England which I can find on the subject is set out in the "Practice" (Seton, 6th Ed., 1050, at page 1139, in the notes to order LXV, rule 1, where it is said:—"A defendant, it seems, cannot enforce by action contribution for costs against a co-defendant, *Dowdy* v. *Middlewick* (1), but he can do so in the original action, *New* v. *Saltworks Co.* v. *Macdonell* (2)." Nothing is said as to contribution between co-plaintiffs, and I think the reason is fairly obvious. Where two or more persons join in an attack, or in a common defence, in an action, I think there is at least an implied contract that they will share the gain or the loss. I think equity at any rate will infer such a contract. I base this opinion on the cases already quoted, *Punjab* v. *Pritam Singh* (3), and the House of Lords case. Indeed, I cannot differentiate this case from that of an ordinary firm of partners suing or being sued as such. In such a case it is obvious, I think, that the partnership must pay the expense jointly pay the losses.

But the answer is that it may often happen that the defendants to a suit may have different, antagonistic and exclusive defences, and that in such a case, in the absence of a contract or some equity between them, there will be no contribution. I deduce from all these cases three rules which may be set out in three simple illustrations:

(1) The plaintiffs are all in the same boat pulling together. Their objects, aims and interests are *ex necessitate* identical and mutual.

(2) The defendants, on the other hand, are persons who have been pushed into the same boat whether they like it or not, and if their interests are adverse *inter se*, they cannot pull together, and, in that case, no contribution may not be allowed.

(3) If, however, the complaint of the plaintiff's boat complained of, not on a mutual expedition, then it may be that under the rule of *Merryweather* v. *Nixon* (4), on grounds of public policy, the court will not help them to get contribution amongst themselves. But it is unnecessary to decide this point.

(1) (1894) 1 Q. B., 38 Ch. Div., 286.
(2) (1900) 2 Q. B., 454.
(3) (1870) 6 N. W. P., H. C. R., 192
(4) (1799) 8 R. R., 4

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[illegible] I now come to the [illegible] which is a case decided by a Bench of this Court in *Tota Ram* v. *Bahadur Singh* [illegible] other persons, caused certain properties to be attached and put up for sale. Subsequently this attachment was set aside with costs, and the plaintiff had to pay the whole of the costs. He sued for contribution. The trial Judge dismissed his suit on the ground that "as the attachment was a tortious act, he could not obtain contribution." I take this to mean that the courts held that the parties were joint tort-feasors. This case was decided seven years before the House of Lords had commented on *Merryweather* v. *Nixan* (2), and the learned Judges (Mr. JUSTICE STRAIGHT presiding) seem to have decided the case on the assumption that the rule in *Merryweather* v. *Nixan*, as explained and qualified by later decisions, was applicable. Having explained this, the learned Judge went on to say:—"Adapting it to the circumstances of the present case, it is obvious that there is no evidence to show that the plaintiff, in attaching and advertising the four villages for sale in execution of his decree against Mudhu Prasad Misr, he was doing an illegal act indeed the inference is all the other way. *Consequently* he was, in our opinion, fully entitled in law to maintain the present suit, and to recover from the defendants the proportionate amount of the costs which he had to pay for them."

The word "consequently," which I have printed in italics to indicate that in the Court's opinion the [illegible] came within the rule of *Merryweather* v. *Nixan* as qualified up to date, there was nothing [illegible] so far as I know, has not been overruled, and is an authority in favour of the respondents. The case of *Shahul Hameed Alim Sahib* v. *Syed Ebrahim Sahib* (3) is also in point.

In my opinion, therefore, this suit was rightly decided, and I would dismiss the appeal.

After I had prepared this judgment and taken considerable time and trouble in examining authorities, I stumbled upon the case of *Ram Saroop* v. *Baij Nath* (4). That case is exactly in point, and if it had been referred to in argument, or if I had been fortunate enough to discover it earlier, it would have been unnecessary to do more than dismiss the

(1) (1887) I. L. R., 9 All., 222.
(2) (1890) 16 Q. B., 910.
(3) (1903) I. L. R., 26 Mad., 75.
(4) (1922) I. L. R., 43 All., 77.

appeal, relying on that decision. However, it is satisfactory to find that I have independently arrived at the same conclusion as my brethren, GOKUL PRASAD and S. M. SULAIMAN.

STUART, J.—I concur in the order proposed.

BY THE COURT.—Appeal dismissed with costs.

Appeal dismissed.

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PERSHAD DAS KOLAPURI v. LACHO NARAIN.

Before Mr. Justice Gokul Prasad and Mr. Justice Kanhaiya Lal.

AMIR-UD-DIN AND ANOTHER (DEFENDANTS) v. MUZAFFAR-UL-HASAN (PLAINTIFF).*

1922 July, 25.

Waqf—Construction of document—Deed giving powers of disposition over the property to the mutawalli during her life-time—Invalidity of dedication.

Where a document which purported to create a waqf *in praesenti* provided that the executant should be the first *mutawalli* with power to apply the income of the dedicated property to her own use during her life-time, and also power to sell any portion of the property during her life-time, it was held that the dedication was invalid as a waqf, not to take effect and the document created another kind of property altogether. *Fatima Bibi v. Idrees-ul-Haqq* (1) and *Mahomed Sulaiman v. Ismail Sulaiman* (2) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. S. M. Sulaiman and *Maulvi Mukhtar Ahmad*, for the appellants.

Maulvi Iqbal Ahmad, for the respondent.

GOKUL PRASAD and KANHAIYA LAL, JJ.:—The question for consideration in this appeal is whether a certain deed of waqf, purporting to have been executed by Musammat Ishrat Begum, on the 10th of August, 1910, was valid and enforceable. The lady died on the 30th of August, 1910. The allegation of the plaintiff was that the deed of waqf was obtained from the lady at a time when she was unwell and unable to form an independent judgment. In fact, it was urged that she was not then in her proper senses and did not understand what she was doing. The court below found that the lady understood what she was doing, but the deed of waqf was invalid inasmuch as there was no intention to make a dedication for religious or charitable purposes.

The deed of waqf provided that the lady shall be the first *mutawalli* of the property dedicated and that she shall have power to apply the income of the property dedicated to her

* Second Appeal, No. 50 of 1921, from a decree of D. C. Hunter, Additional Judge of M. Shahr, dated the 22nd of December, 1920, confirming a decree of Lala Prasad Jain, Subordinate Judge of Moradabad, dated the 11th of November, 1919.

(1) (1918) I. L. R., 6 Pat., 1.
(2) (1918) I. L. R., 41 All., 1.

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own use as long as she was alive, and, if there was a surplus, to apply the same to the purposes specified in any manner she liked. It further states that she shall not have the power to sell or mortgage the property during her life-time. It then goes on to say that after her death her sister Musammat Hashmat Begum and succeeding generations specified therein, who are the present defendant-appellants, shall have an absolute right and apply the income to the said purposes. The purposes specified were the maintenance of an Arabic school for teaching theology and the expenses connected with a mosque situated in her native village. The trial court held that the deed of waqf had been acted upon after the death of the lady, but the lower appellate court found that only a part of the income was applied by her successors in office to charitable purposes.

It is obvious from the terms of the deed that the plain intention of the executant was to retain an absolute power over the property said to have been dedicated. The essential requisite of a valid waqf is a permanent dedication of any property by the donor substantially for religious and charitable purposes. The dedicator should completely divest himself of the ownership of the appropriated property from the time the dedication takes effect. There is no such thing here. The dedicator retained for herself a full power to sell and transfer the property during her life-time. Such a condition derogates from the nature of the grant, and as point is set in *Fatma Bibi* v. *Advocate-General of Bombay* (1), it is inconsistent with a valid waqf, which must be certain as to the property appropriated and, at the same time, unconditional, and not subject to an option. There might be a reservation of the annual profits of the property for the benefit of the donor for her life: but a provision empowering the donor to sell and to appropriate the proceeds thereof for his or her own benefit, would make the settlement invalid. "According to the two disciples," says Baillie, "waqf is the detention of a thing in the implied ownership of Almighty God in such a manner that its profits may revert to or be applied for the benefit of mankind, and the appropriation is obligatory, so that the thing appropriated can neither be sold, nor given, nor inherited." (Baillie's Muhammadan Law, Vol. I, p. 558). In *Naim-ul-Haq*

(1) (1881) I. L. R., 6 Bom., 42

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v. *Muhammad Subhan-ullah* (1) one of the necessary constituents of a valid waqf was described to be a substantial and effective dedication of the property to religious or charitable uses; and a condition whereby the donor reserved to himself a power of spending the profits of the property at his own discretion and an exclusive right to transfer the corpus at any time he liked, was considered to be inconsistent with a valid dedication. The waqf in the present instance cannot, therefore, be upheld.

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It is argued on behalf of the defendants appellants that the document can, at all events, be treated as a testamentary disposition, postponing the dedication of the property in dispute till the death of the testator. The document in question, however, purports to create a waqf *in praesenti* without giving all the powers that a *mutawalli* ought to possess to carry out the purposes of the trust. It does not purport to make a dedication from the date of the death of the lady and it cannot, therefore, be regarded as a testamentary disposition to take effect after her death. The court below have rightly construed the document and we agree with the view which they have taken. No other pleas have been pressed.

The appeal fails and is dismissed with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Walsh.

EMPEROR *v.* ANGNU SINGH AND OTHERS.*

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July, 25.

Code of Criminal Procedure, section 110 Security for good behaviour Proceedings against several accused jointly Section to be cited No

It is not permissible to take proceedings under section 110 of the Code of Criminal Procedure against several persons jointly, unless such persons are confederates or associates [illegible] evidence to justify application

Held also that it was not [illegible] court, before granting sanction for the prosecution of a person for perjury committed before it, should as a matter of [illegible] cause the proposed order. The issuing or not issuing of notice is entirely a matter for the discretion of the court in the circumstances of each case.

Observations on the principles to be applied in considering an application for revision of an order for security for good behaviour.

THE facts of this case are fully set forth in the judgment of the Court

* Criminal Revision No. 1271 of 1921 from an order of Pandit Lal, District Magistrate of Basti, dated the 14th of March 1921.

(1) (1917) I. L. R. 39 All. 51.

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Mr. *G. W. Dillon*, Mr. *J. M. Banerji*, Mr. *N. C. Vaish* and Babu *Saila Nath Mukerji*, for the applicants.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

WALSH, J.:—This is one of the most remarkable cases under section 110 which has ever come under my notice. There are various reasons why I say that. In the first place, the procedure which has been adopted from first to last, appears to me to be an abuse of the section. Twelve men were charged together or notices were issued against them together under this section, I will not say, without anything upon the evidence seriously connecting them, but with a very superficial colouring of evidence and a vague, general and hearsay description connecting them together as partly village leaders of a gang, partly notorious dacoits and partly habitual receivers. The police, in support of this case, called a variety of witnesses, of every sort and description to establish the character which they sought to prove, amounting altogether to 76 in number, and having little or nothing in common except the fact to which most of them spoke,—(*a*) that they lived at least 8 miles away from the village of the defendants, and (*b*) that they have no personal knowledge of them themselves. Indeed it is impossible to read the principal evidence for the prosecution which has been relied upon by the Magistrates in the courts below, without acquiring the impression that it was really a gang case which the police were running on hearsay evidence under the guise of a *badmashi* charge under section 110. The witnesses who were put in the box were not disposed of at one hearing and each by one piece of evidence, but they were scattered about and divided up in the most bewildering fashion, so that it is a work of considerable magnitude and one almost impossible of accomplishment by any appellate court without the assistance of somebody who has minutely studied the record, to trace the sequence of statements of any particular witness. But, so far as I can tell, the result of this voluminous and chaotic recording of evidence was that the defence evidence and the examination of the accused under section 364 was not even reached until the 9th of September, 1921, fully two months after the hearing had been commenced. Apart from any other feature of this case, it seems to me very hard, almost oppressive, to any set of defendants to charge them together in this way, unless the

whole of the evidence against all of them is precisely the same and they are to be dealt with on the same facts, and compel them to fight each his own individual battle during a prolonged inquiry, a great deal of which concerns for the moment only one out of the general body. I have myself upset orders under this section where the evidence against one person charged has been used in the judgment as evidence against another not mentioned by the particular witness. There is always a danger of that, and a danger of its unconsciously operating on the mind of the tribunal even though such operation does not manifest itself in the judgment, and if there were no other feature in the case, I should have been disposed to set aside the proceedings on that ground alone, disregarding the merits, and directing the Magistrate to hold a further inquiry into the case of each accused separately or each batch of accused who could fairly be said to be classified under evidence common to each individual member of the batch. But that would be a great hardship upon the defendants, and there are many other points in this case which render the further consideration of this question superfluous, except that I recommend these observations to the consideration of the District Magistrates in general. Without laying down any rule or consulting any section, common sense and common justice dictates that proceedings against a man for *badmashi* should be confined to himself alone, unless the case is that he has a confederate or a partner to whom all the evidence is equally applicable.

A further objection based upon the same procedure, but entirely separate and independent, is the objection which to my mind arises out of the enormous mass of witnesses in this case on the prosecution side. There are seven defendants in all, and although it may not be out of the way in a heavy gang case, it seems to me monstrous and to amount to something like persecution, that each individual in a group of persons, supposed each in his own way to be a *badmash*, should be condemned to submit to, and to employ counsel for, the examination and cross-examination of a number like 76 witnesses during a proceeding lasting over two months. If the police cannot satisfy an experienced Magistrate with less than 76 witnesses, or in less time than two months, that a man is a *badmash*, the sooner they surrender the task at its inception the better for the interests of public justice. It

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cannot be to the good of anybody that such unheard of prolixity and waste of public time should be indulged in as was indulged in in this case. The Magistrate himself observed upon this feature saying: "If the repetition of a man cannot be proved by the evidence of 10 or 11 witnesses, it cannot be proved by 500." But a feeble protest of that kind is quite useless, and it is the duty of the District Magistrate, if he thinks that 10 or 12 witnesses are a sound rule sufficient for a case of this kind, and he finds one of his subordinate officers permitting 75, to lay down some rule of common sense to guide his subordinates in the exercise of their discretion, not a caste iron rule like the section of a code but something to enable them to guide their own proceedings within reasonable limits. The Magistrate's examination on this head seems to have been the heavy record which he says has taken him a long time to read and digest. I have already taken a day and a half over this case, but I have not read and have declined to read the record to which the Magistrate refers. If he read it, it is very much to his credit, although it must have consumed an enormous amount of public time, but whether he ever digested it is a matter which I shall proceed to consider in a few moments. Naturally enough the defendants confronted with this mass of voluminous evidence or, as one might describe it, "carpet attack," resorted to the expedient of trying to defeat the prosecution at their own game. I am not impressed with the tactics which guided their decision nor with the result but I cannot blame them and I do not quite know what they were to do unless they had counsels in charge of their case strong enough to protest against the public scandal of the prosecution proceedings, and to entreat the Magistrate to use his common sense and get a few selected but relevant witnesses put forward by each defendant. The result has been that in this case the total number of witnesses, so far as I can discover by a rough computation, and there is naturally considerable margin for error, amounts to 102, and the time spent upon this proceeding before a Magistrate specially appointed to hear it was no less than six months. I imagine that this proceeding is without parallel in the administration of this section. It seems to me to amount to a scandalous waste of public time and Magisterial energy and to be a very serious infliction upon the defendants who have attended continuously before me through their counsel. I do not

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proceedings have practically exhausted their financial resources. As I have said before, if it is going to take the police and the Magistrate anything like six months, or even more than a month, to prove *badmashi* they had much better drop them altogether and devote 1/10th of their efforts to catching one of the miscreants in the accomplishment of the crime in which he is said to be daily engaged.

I recognize that it is a very serious matter to interfere with an order of this kind, especially one to which so much public time and energy have been devoted. I recognize also that the question in issue is, in the main, a question of fact, the finding on which this Court has no right, in the ordinary way, to interfere with or even to review. I recognize also that the District Magistrate who heard this case in appeal has managed to put his judgment into a form which suggests that he has given full consideration to the defendants' case and heard the appeal fairly and according to law. But I propose to state certain principles which, in my opinion, have been established in this Court by a series of decisions explaining how this Court deals with such cases on revision. The High Court, it has been said, is not a court of appeal, but it is its duty to endeavour to weigh the evidence and to see whether the case has been fairly considered from the point of view of the defendant: *Mitharban Singh* v. *Emperor* (1).

Secondly, if the evidence for the defence is equally good as that for the prosecution, the High Court may quash the order in revision: *Ganga Singh* v. *King-Emperor* (2).

Thirdly, witnesses who voluntarily come forward, whether as friends or associates of the accused, to give them a good character, must not be brushed aside unless they are discredited as regards their good faith and honesty, just as witnesses in any other proceeding must be discredited before they are rejected by the tribunal: *Emperor* v. *Rahu* (3).

Fourthly, evidence of general repute by persons who have no personal knowledge of the accused and know nothing of his business and circumstances, is not sufficient in itself to justify an order: *Kalka* v. *Emperor* (4). And, lastly, vague repetition, unaccompanied by direct evidence personally affecting each accused person, or accompanied by direct evidence which

(1) (1915) 43 A. L. J., 1016.
(2) (1923) 69 A. L. J., 383.
(3) (1920) I. L. R. 42 All., 189.
(4) (1926) 93 A. L. J., 20.

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breaks down, is not sufficient in itself to justify an order: *Bisheshwar Dayal* v. *Emperor* (1).

In the light of these authorities I have listened to the very able criticism, of Mr. *Salil Nath Mukerji* and Mr. *Dillon*, only of those witnesses whom the appellate court, following the trial court, has vouched for as having satisfied his conscience in deciding upon this mass of complicated and general evidence that the conclusion reached was correct.

[His Lordship dealt with the evidence at length and proceeded:]

I am quite satisfied that in dismissing the appeal upon the grounds on which he did, the District Magistrate has totally ignored or hopelessly misunderstood the salient features of the evidence. However lamentable such a decision may result from such a voluminous proceeding may be in the public interest, nonetheless there has been a grave miscarriage of justice and the whole proceedings must be set aside and the bonds, if entered into, discharged in the case of all the applicants.

On the application of Mr. *Salil Nath* for Nawab Singh, I have no hesitation under section 195 of the Criminal Procedure Code in sanctioning the prosecution of Qasim Ali, son of Basharat Ali, for having sworn on the 7th of August, 1921, at the hearing of the case against Nawab Singh under section 110 before the Magistrate, Saiyid Zamiruddin Khan, while under cross-examination, that he had not written any part of the *hukumnama*, exhibit H, which was shown to him, and that it was not in his handwriting, and, within a minute or two afterwards, that he had written it and that it was in his handwriting.

It has been generally supposed and sometimes ruled by single Judges that before sanction is granted, notice should be issued to the person proposed to be charged. There is no statutory obligation upon any Judge to do anything of the kind. There is no authority binding upon him in this Court compelling him to issue notice unless he thinks it is a case in which notice ought to be issued. In this case, if the record which is before me is correct, this man, who must certainly have some education and who has acted for many years as a *karinda*, must have known perfectly well whether he had issued written orders to his tenants or whether he had not. He must also know his own handwriting. He can [illegible]

(1) (1921) 26 A. L. J., 668.

that it is wrong and dishonest and grossly unfair to an accused person, when giving evidence in a criminal case, to deny what you know is true. Granting sanction merely removes the statutory bar which otherwise prevents Nawab Singh taking steps to prosecute Qasim Ali Khan for this alleged falsehood. It is the duty of the Judge to grant sanction if he thinks it is in the public interest, independently altogether of any future grievance or complaint which the alleged delinquent may think he has a right to make. He may have an answer on the merits but that has nothing to do with me. I grant sanction with the hope that it will not be used to put pressure upon Qasim Ali or for any other purpose except taking fair and proper steps for prosecution, but I should grant it just the same and on the same terms whether Qasim Ali was represented by 100 counsel, and I, therefore, regard issuing notice to him as a sheer waste of public time. I sanction the prosecution of Qasim Ali for the statement abovementioned for an offence punishable under section 193 of the Indian Penal Code; Nawab Singh to take necessary steps for such prosecution within six weeks from to-day, otherwise the sanction to lapse, with liberty to apply to me for extension of time.

Proceedings set aside.

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FULL BENCH.

Before Sir Grimwood Mears, Knight, Chief Justice, Mr. Justice Piggott, Mr. Justice Gokul Prasad, Mr. Justice Kanhaiya Lal and Mr. Justice Sulaiman.

LALAJI SINGH (DEFENDANT) v. GUR NARAIN (PLAINTIFF) AND HARBANS SINGH AND OTHERS (DEFENDANTS).*

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Hindu law [illegible] a Hindu testator [illegible]

A Hindu [illegible] the exercise of the testamentary power [illegible]

Held [illegible] Act, though [illegible] gift made by a Hindu [illegible] passing of that Act [illegible]

* First Appeal No. [illegible] of 1920, against the decree of Chaudhri Nihal Singh, Additional Judge of Gorakhpur, dated the 19th of January, 1920.

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necessary (*Mussumat Dhan v. Mussumat Dhan* (1), *Bibi Sahebzadi v. Bibi Fazlan* (2), *Chidambara Chetti v. Muthukumara Chetti* (3), *Mussumat Jhari Kuar v. Kashibir Singh* (4), *Mahi Dhar v. Narain Das* (5), *Sivakami v. Ekagavira Das* (6), and *Pirbi Chand v. Lekha* (7), referred to.

THE facts material for the purposes of this report are as follows:—

Tulsha Kunwar, who was the owner of seven villages, executed a deed of gift, on the 20th of January, 1891, in favour of her daughter, Narain Kunwar, thereby giving to the latter immediate and absolute possession of four villages. As to the remaining three villages, the condition was that Tulsha Kunwar would retain possession and enjoy profit accruing therefrom during her lifetime, but would not have power to make any transfer in respect of them, and that after her death, the daughter would come into proprietary possession of the same. On the 5th of February, 1910, Narain Kunwar died, and the plaintiff, who was the cousin of the husband of Narain Kunwar, claimed to be her heir and brought a suit against Tulsha Kunwar for recovery of the entire seven villages.

Dr. *Kailas Nath Katju*, for the appellant, submitted that so far as four villages were concerned, it was conceded that the gift was complete, but as regards the remaining three, such a gift was unknown to Hindu Law. At best it could be described to be a testamentary disposition. The donor did not intend to part with the possession of the said villages, and, therefore, no gift came into existence. Judged in the light of sections 123 and 129 of the Transfer of Property Act, the deed could not be said to be valid, because the said section did not abrogate the rule of Hindu Law requiring delivery of possession. The deed of gift must say that possession was given on the date of gift. The donor must have physical possession at once or hold an instrument for enforcing immediate possession. In order to make a gift valid, there must be a complete extinction of the proprietary right of the donor. He cited *Dugar Dabee* v. *Mothura Nath Chattopadhya* (8). In that case the donor reserved the right to remain in the house for his life time and,

(1) (1887) I. L. R., 14 Calc., 446
(2) (1907) I. L. R., 31 Calc., 850.
(3) (1901) I. L. R., 24 Mad., 345.
(4) (1906) I. L. R., 31 Bom., 287
(5) (1881) I. L. R., 4 All., 40.
(6) (1894) I. L. R., 16 All., 185
(7) (1903) I. L. R., 25 All., 368
(8) (1883) I. L. R., 9 Calc., 854

consequently, the gift was held invalid. In the case of *Harpuran Anandram* v. *Varan Hurikant* (1) a gift of land was declared invalid it secured possession or reception or rent by the donee. There must be delivery or possession, even though for a moment and thereafter the possession might be given back to the donee by the consent of the donee. It must be with the permission of the donee that the donor could retain possession of any kind over the land gifted. In the present case the donor was not retaining possession by such consent or permission; any such supposition was absolutely contrary to the sentiment and intention expressed in the deed. He cited and discussed *Balmakund* v. *Bhagwan Das* (2), *Kalidas Mullick* v. *Kanhaiya Lal Pandit* (3) and *Sitaram Ramkrishna* v. *Ramkrishna Nandlal* (4).

The deed could not come under the category of a will which could come into force only at the time of the death of the testator. The word was "deo" which meant "giving" and the law should be interpreted as it stood in olden days and not as conceived in modern times. According to eminent authorities on Hindu Law, such as Trevelyan and Mayne, a Hindu was not competent to make a gift and at the same time withhold possession from the donee.

Reference was made to Trevelyan's Hindu Law, 2nd Edition, p. 522; Mayne's Hindu Law, 9th Edition, paragraphs 376, 377; Macnaghten's Hindu Law, Vol. I, p. 218 and Vol. II, p. 207.

Dr. *Surendra Nath Sen*, for the respondent, contended that the case entirely turned on the construction of the document. The whole estate was transferred to the donee, only the rights of possession and enjoyment of usufruct, relating to the three villages, were postponed. As soon as a deed of gift was registered, there passed a title, and, in the present case, the deed was registered. There was an acknowledgment of the donee's right and the donor precluded herself from alienating the property in any form. The donor did everything to put the donee into actual possession if not actual possession and the gift was, therefore, a good gift. He cited *Ram Lal Seth* v. *Kanai Lal Seth* (5) and drew out the cases cited by the appellant.

(1) (1916) I. L. R., 38 All., 1 (P. C.).
(2) (1918) I. L. R., 40 All., 1 (P. C.).
(3) (1922) I. L. R., 49 Cal., 239.
(4) (1914) I. L. R., 38 Bom., 340.
(5) (1922) I. L. R., 49 Cal., 963 (P. C.).

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The Transfer of Property Act, section 123, does not require a Hindu making a gift to deliver immediate possession. It modified the rule of Hindu Law, if any did exist, that delivery of possession must accompany a gift. The following cases were cited: *Dharmadas Das* v. *Nistarini Dasi* (1), *Bulbhadra* v. *Bhawani* (2), *Jairo Kuar* v. *Sheo Kuar* (3), *Madhavrao Moreshvar Pant Amatya* v. *Kashibai Kom Dattatraya* (4), *Sian Bhari* v. *Narendra* (5), *Balmukund* v. *Bhagwan Das* (6) and *Pirthi Chand* v. *Lekhan* (7).

No text of Hindu Law has been cited by the appellant as showing that a transfer like the present one is prohibited by the Hindu Law. Nor is such a disposition of property prohibited by any law of the land or repugnant to morality or public policy. In the absence of any definite prohibition the deed should be upheld as a valid disposition of property by its full owner. He cited *Sreemutty Soorjeemoney Dossey* v. *Denobundoo Mullick* (8).

Dr. *Kailas Nath Katju*, in reply, submitted that the fact that the Transfer of Property Act had made some modifications in the Hindu Law was immaterial to the present case. The rules of Hindu Law had, no doubt, been considerably modified in Bengal, but not so far as the United Provinces were concerned. It was open to a Hindu to make a gift by which he deprived himself of all interests and transferred such interests to one or two individuals in equal or unequal shares, or by way of a life-estate to one and the remainder to the other. It was, however, not open to the donor to reserve a life-interest to himself. The question, in a nutshell, was: Could the donor say, "I am making a gift but will give possession in 15 years"? It was submitted that he could not.

MEARS, C. J. and PIGOTT, GOKUL PRASAD, KANHAIYA LAL and SULAIMAN, JJ.: The only point referred to the Full Bench for consideration is the question of the validity or otherwise of a deed of gift, dated the 29th of January, 1891, executed by Musammat Tulsha Kunwar in favour of her only daughter, Musammat Narain Kunwar. This document recites that Musammat Narain Kunwar was her sole issue and the

(1) (1887) I. L. R., 14 Calc., 442.
(2) (1907) I. L. R., 34 Calc., 853.
(3) (1901) I. L. R., 24 Mad., 519 at 522
(4) (1906) I. L. R., 31 Bom., 287.
(5) (1881) I. L. R., 4 All., 40.
(6) (1894) I. L. R., 16 All., 185.
(7) (1903) I. L. R., 25 All., 358
(8) (1866) 9 Moo. I. A., 123

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her wished to give the entire property in seven villages to her; but that, inasmuch as during her life time she had also to provide for her own private maintenance and other necessary expenses, and it was reprehensible and forbidden for her to receive any benefit or to take anything from her daughter, she considered it proper to get the name of her daughter recorded over four villages at once, but to remain in possession of the other three villages for her life, meeting the expenses of her maintenance and other necessary expenses from the profits thereof. But all the seven villages were comprised in the gift, and it was stated that she had no longer any claim or right left in respect of all the property gifted and the donee would have all the powers of a proprietor, with this exception that the three villages last mentioned would remain in her possession during her life and she would bring the profits thereof into her use, but she would have no power of sale, mortgage, gift, or other transfer, and they would after her death come into the proprietary possession of her daughter.

It is an admitted fact that Musammat Tulsha Kunwar allowed Musammat Narain Kunwar to obtain possession over the four villages first mentioned, and got her name recorded in respect of them in the revenue papers. There is thus no doubt as to the genuineness of her intention. It is assumed for the purpose of this reference that Musammat Tulsha Kunwar was the full proprietor, and the only question is as to the validity of the gift in respect of the three villages, over which she had retained the right of remaining in possession for life and did in fact retain possession. Musammat Narain Kunwar died in the life-time of Musammat Tulsha Kunwar, and the present dispute is between the respective heirs of the two ladies.

Reading the document as a whole, there can be no doubt that it was not a bequest of the three villages by Musammat Tulsha Kunwar in favour of her daughter, but that she did intend to effect a transfer *in praesenti* of her proprietary interest in the three villages, though she stipulated that she would have the right to remain in effective possession of them by appropriation of their assets for her life.

The learned [illegible] that under the Hindu law [illegible] absolutely [illegible] provision of the Hindu Law [illegible] passing of the Transfer of Property Act and [illegible]

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case a provision that the donee is not to deliver possession during her lifetime to the donee. Attack the gift [illegible]

As to the first point it may be conceded at once that general trend of the [illegible] Transfer of Property Act [illegible] Hindu Law a gift, [illegible] was invalid. [illegible] acted on [illegible] necessary to review [illegible] this [illegible]

We are, however, [illegible] that whatever might have been the case in Hindu Law prior to the passing of the Transfer of Property Act, it must now be held that a gift of immovable property can be validly effected by a registered instrument signed by or on behalf of the donor and attested by at least two witnesses, and that no further [illegible] to effectuate a transfer. Section 129 of the Transfer of Property Act provides that nothing contained in that Act shall be deemed by section 123, to derogate from any rule of Hindu Law. This clearly indicates that section 123 was not intended to override a rule of Hindu Law. Section 123 provides that for the purpose of making a gift of immovable property, the transfer must be effected by a registered instrument duly signed and attested, whereas for the purpose of making a gift of movable property the transfer *may* be effected by a registered instrument duly signed or by delivery. It is obvious that under the latter clause a gift of movable property can be effected by a duly signed and registered instrument without delivery. This does away with the provision of Hindu Law, requiring delivery of possession as regards movable property. Now, the first clause uses the word "*must*" which is significant, and omits the words "or by delivery." A reasonable interpretation of section 123 would, therefore, be that a registered instrument duly signed and attested is quite sufficient to effect a gift of immovable property, and that such a gift can be effected in no other way.

Dr. Katju, on behalf of the appellant, has strongly contended that by section 123 it was merely intended to add one more requirement of law, namely, that of attestation and registration, to those enjoined by the Hindu Law, and that the section did not mean that where there was a registered document duly signed and attested, all the other requirements of Hindu Law were dispensed with. Section 123 has, how-

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ever, been interpreted by all the High Courts continuously for a very long period in the way first indicated, and there is now a uniform consensus of opinion that the effect of section 123 is to supersede the rule of Hindu Law, if there was any, for making the delivery of possession absolutely essential for the completion of the gift. We may only refer to a few cases for the sake of reference: *Dharmadas Das* v. *Nistarini Dasi* (1), *Balbhadra* v. *Bhawani* (2), *Alabi Kaya* v. *Mussa Kaya* (3), *Madhav Rao Moreshwar Pant Amatya* v. *Kashibai Kom Datlubhai* (4), *Man Bhari* v. *Nanuidh* (5), *Balmukund* v. *Bhagwan Das* (6) and *Phul Chand* v. *Lakkhu* (7). Where the terms of a statute or ordinance are clear, then even a long and uniform course of judicial interpretation of it may be over-ruled, if it is contrary to the clear meaning of the enactment; but where such is not the case, then it is our duty to accept the interpretation so often and so long put upon the statute by the courts, and not to disturb those decisions, *vide* the remarks of their Lordships of the Privy Council in the case of *Trivandum Devaraya Ellaya* v. *Sri Sri Gopinath Jiu Thakur* (8). We are, therefore, clearly of opinion that it must now be accepted that the provisions of section 123 do away with the necessity for the delivery of possession, even if it was required by the strict Hindu Law.

The third point raised by the learned advocate for the appellant requires a little consideration. It has been very strenuously contended that where the deed of gift itself provides that the donor is to retain possession over the property and appropriate the profits, the transaction is void *ab initio* and is not a valid gift under the Hindu Law at all. Reliance is strongly placed on a number of cases which were decided prior to the passing of the Transfer of Property Act, in which it was held that the delivery of possession was absolutely essential, and it is contended that when the delivery of possession was essential then a provision in the deed that no delivery was to take place at all, invalidates the gift altogether.

In the first place these earlier cases were decided prior to the passing of the Transfer of Property Act, and the provisions of section 123 of the Act were not applicable. Now that

(1) (1902) I. L. R., 14 Calc., 146
(2) (1904) I. L. R., 31 Calc., 853
(3) (1904) I. L. R., 31 Mad., 349 at 352
(4) (1906) I. L. R., 31 Bom., 287.
(5) (1887) I. L. R., 8 All., 40
(6) (1910) I. L. R., 16 All., 185
(7) (1920) I. L. R., 25 All., 358
(8) (1916) 25 C. L. J., 279 at 284

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the delivery of possession is no longer necessary, it would follow that a provision in the deed of gift that the donee was to take place during the lifetime of the donor, would necessarily invalidate it.

In the second place, the restriction is to especially advantage of a limited interest does not [illegible] against a complete transfer of the title, and unless there is something in Hindu Law which is repugnant to it, it must be upheld. Now, according to our understanding, the true intention of the donor was to collect a fixed sum for the [illegible] of the property conveyed [illegible] and to vest the same in the donee, with a reservation of the right to enjoy the profits during his own life. We do not consider that she meant to create two distinct and separate estates in one, which would be carved out of the entire estate which she bestowed on the donee, provided that there was which she had reserved for herself would revert to the donor after her own death. On the other hand we are distinctly of opinion that the whole interest in the three villages vested immediately in the donee, and the donor had no power of disposal left over it. The only right that was reserved to her was to enjoy the profits thereof. There was an immediate gift of all the seven villages, but the enjoyment by the donor of the profits of three villages was postponed till after the death of the donor.

Such a gift is not in any way opposed to common law or to public policy, nor is such a transfer invalid under the provisions of the Transfer of Property Act. We have, therefore, to see whether there is anything in the Hindu Law which is repugnant to it. No authority which is exactly on point has been cited before us on either side. The learned advocate for the appellant has, however, referred to us the case of *Dagdi Dabee* v. *Mathuranath Chattopadhya* (1). There the gift was not governed by the Transfer of Property Act. The view then expressed was that the gift of a house, in a case where the donor reserved to himself the right of remaining in the house for the term of his life and which was unaccompanied by physical delivery, or any symbolical act by which physical delivery could be held to be implied, was invalid. The decision was based entirely on the supposed rule of Hindu Law that delivery of complete possession was absolutely essential. That ruling is hardly in consonance with the opinion expressed by

(1) (1883) I. L. R., 9 Calc., 854

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the Calcutta High Court in subsequent cases. The case cited in Macnaghten's Hindu Law, Vol. 2, at page 207, is not in point, because there the competition was between a gift, unaccompanied by the delivery of possession, which was to take effect after the death of the donor, and a subsequent gift by which the donor delivered possession to another donee. That was strictly not the case of a gift *in praesenti*, but something in the nature of a bequest. At that time testamentary dispositions not having been separately recognized, the case was treated as falling under the heading of gifts.

Lastly, the case of *Harjivan Umedram* v. *Narun Haribhai* (1) has been cited, and our attention is particularly drawn to the texts quoted at page 34. But there, too, the possibility of the donor retaining possession of the property with the consent of the donee is recognized. We cannot take these texts necessarily to imply that the donor cannot gift away the property with a condition attached, reserving the usufruct of a part of the property to himself for life. The other cases cited are not directly in point.

A reference has also been made to a passage in *Ram Lal Sett* v. *Kamal Lal Sett* (2) to the effect that "gifts are of three kinds: those which convey a present title and interest, and a present right of enjoyment; those which are vested, that is, present in interest, but in which the enjoyment is deferred; and those which are contingent, that is to say, in which neither title nor right of enjoyment is given at present, but both depend upon future and certain events. All these kinds of gifts are admissible among Hindus, all are recognized by the Succession Act, the Hindu Wills Act and the Transfer of Property Act. All these kinds of gifts may among Hindus be given, subject to various restrictions, either *inter vivos* or by will, and, speaking generally, the same law applies in either case." But that remark is certainly an *obiter dictum*.

In West and Bühler's Digest of Hindu Law, 4th Edition, at page 888, it is stated that the grantor may stipulate or provide for various advantages to himself or to others arising out of the property, and so far diminish the advantages of the proprietor in it, and then on page 890 it is said on the authority of Jayannath that the gift of property is valid though it be accompanied by the donor's retention of a life interest. No distinction was, however, made by Jayannath between a gift

(1) (1867) 4 Bom. H. C. R., A. C., 30.
(2) (1881) I. L. R., 12 Calc., 563 at 568.

1923 and a testamentary disposition. The case of *Kasim Husain* v. *Sharifunnissa* (1) where a gift of a small estate with a reservation of the income of that estate, without power of alienation, for life was held to be valid, was a case under the Muhammadan Law and is not applicable to the present case.

In the absence of any clear authority restricting the power of the donor, we are of opinion that there is nothing in the Hindu Law which on principle would make a reservation of the usufruct of a part of the property for life by the donor, or the postponement of the enjoyment by the donee of a part of the profits till after the donor's death, a repugnant condition and render the gift invalid. Furthermore, we are of opinion that inasmuch as the legislature has now dispensed with the necessity of delivery of possession in the case of gifts by Hindu donors, a reservation of the kind indicated above would now much less affect the validity of such gifts. Under the Hindu Law, gift and its acceptance by the donee are essential. Here both these elements exist.

Our answer to the reference, therefore, is that a Hindu lady who is the full proprietor of immovable property, can by a registered document, duly signed and attested, validly make an immediate gift of it, although she reserves to herself the enjoyment of the usufruct or profits of a part of the property for her life-time and without retaining any power of alienation over it.

The appeal will now be restored to the Division Bench for disposal.

[On receipt of the decision of the Full Bench, the Division Bench dismissed the appeal with costs.]

Appeal dismissed.

(1) (1888) I. L. R., 5 All., 205.

REVISIONAL CRIMINAL.

Before Mr. Justice Stuart.

1922 July, 27. EMPEROR v. BECHU CHAUBE AND ANOTHER.*

Criminal Procedure Code, sections 342, 537 *Procedure* [illegible] *witness for the prosecution after the* [illegible] *taken irregularly.*

After the statements of the accused had been recorded, a witness for the prosecution was examined. That witness, however, did not [illegible] to the evidence which had been already given for the prosecution. The accused had had an opportunity of explaining. *Held* that [illegible] examination of the witness out of order was an [illegible]

* Criminal Revision No. 490 of 1922

the circumstances vitiate the proceedings. *Subrahmania Ayyar v. King-Emperor* (1), referred to.

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EMPEROR v. BACHU CHAMAR

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *A. P. Dube*, for the applicants.

The Assistant Government Advocate (Mr. *R. Malcomson*) for the Crown.

STUART, J. :—The first point raised by the learned counsel for the applicants is one upon which there has been divergence of opinion in courts in India. It appears from the record that the witnesses for the prosecution against the applicants were examined-in-chief up to the 10th of April, 1922, and on that date the applicants were questioned generally on the case by the trying Magistrate, under the provisions of section 342, before they were called on for their defence. After that, the witnesses for the prosecution were cross-examined and, further, one witness, a head constable, Ram Gopal Singh, was examined for the first time for the prosecution. The evidence which he gave was to the effect that he had arrested the applicants. The point taken by the learned counsel is that by examining this head constable after the statements of the accused had been taken, the trying Magistrate acted contrary to the provisions of section 342. The learned counsel is undoubtedly right in that contention. Under the provisions of section 342 all the prosecution witnesses should have been examined-in-chief before the final questions were put to the applicants. The applicants were not examined again after the 10th of April. The provisions of this portion of section 342 are imperative. The words are :

"For the purpose aforesaid he may question the accused generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence."

But it proceeds to [illegible] provisions of section 342 [illegible]. The opposite portion of that section [illegible]

"Subject to the [illegible] sentence, no finding, sentence or order [illegible] reversed or altered under chapter XXVII on account of any error, omission or irregularity in the complaint, summons, warrant, charge, proclamation, [illegible] or other proceedings under this Code, or any inquiry, trial, [illegible] unless such error, omission or irregularity has, in fact, occasioned a failure of justice."

It certainly appears [illegible] has been held implicitly that [illegible]

[illegible]

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circumstances, but in this High Court it has been decided that an omission to comply with the provisions of section 342 does not involve a setting aside of the conviction. The main authority upon the subject is to be found in the well-known decision of their Lordships of the Privy Council in *Subrahmania Ayyar* v. *King-Emperor* (1). Their Lordships did not, in that case, however, distinguish between an "error" and an "irregularity." The two words clearly do not mean the same thing. I regard the failure to apply correctly the provisions of section 342 as an error and not as an irregularity, and I do not understand their Lordships to have laid down that an error, which has not in any way prejudiced a person convicted, may not be condoned under the provisions of section 537 if it is not fatal to the validity of the decision and is concerned with the proceedings rather than the mode of trial. Their Lordships in that particular case were considering neither an error, nor an omission, nor an irregularity but an illegality. In that case the trial was vitiated in its inception. A provision of the Criminal Procedure Code had been transgressed, and the result of the transgression was that the court had actually no jurisdiction to hear the case. The court had only jurisdiction to try in one case a person for three offences of the same kind committed within a period of twelve months, and it actually had tried a person for 41 offences committed during a period of two years. Their Lordships held that the course pursued was plainly illegal, and continued:

> "Upon the assumption that the trial was illegally conducted, it is idle to suggest that there is enough left upon the indictment upon which a conviction might have been supported if the accused had been properly tried. The mischief sought to be avoided by the statute has been done."

They said afterwards:

> "The remedying of mere irregularities is familiar in most systems of jurisprudence but it would be an extraordinary extension of such a branch of administering the criminal law to say that when the Code positively enacts that such a trial as that which has taken place here shall not be permitted, that this contravention of the Code comes within the description of error, omission or irregularity."

And in quoting the decision in *Smurthwaite* v. *Hannay* (2), reference was made to the pertinent observation of Lord RUSSELL:

> "Such a joinder of plaintiffs is more than an irregularity; it is a constitution of a suit in a way not authorized by law and the rules applicable to procedure."

The tests to be applied in considering whether a particular infringement of the provisions of the Criminal Procedure Code

(1) (1901) I. L. R., 25 Mad., 61 at pp. 96-98.
(2) (1894) A. C., 494.

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is one which does or does not come within the purview of section 537 appear to me to be these. Has the error gone to the whole root of the trial? Does it in effect vitiate the proceedings? Has the court assumed an authority which it does not possess? Has it broken the vital rules of procedure? If the error is of such a nature, the proceedings are vitiated in their very inception and section 537 has no application. But the mere fact that a certain provision of the Code is imperative does not in itself indicate that a breach of that provision vitiates the whole proceeding. In fact it might very well be argued that in order to create an error there must be some breach of an imperative rule, for, if the matter were discretionary, it would appear that no opportunity for error could arise. What I have to consider is the simple point, were the proceedings vitiated? In my opinion they were not vitiated.

I come now to the second point: "Were the applicants prejudiced?" Now the case against them in respect of the matters to which this head constable deposed had already been disclosed in the previous evidence, and in their examination on the 10th of April, they were actually asked to explain away the very circumstances to which the head constable subsequently deposed. Furthermore, they did not deny their arrest, and with regard to the possession of the property said to have been the subject of theft, their case was that that property had been given to them by the complainants. It is thus clear that they were not prejudiced by this error. There was an error undoubtedly and the Magistrate should be careful to avoid the error in future. But as the case has been decided correctly on the merits, this error has in no way affected the result.

The third point argued was that on the facts the conviction under section 457 was not made out. I cannot accept this contention. On the facts, the applicants were rightly found guilty of lurking house trespass by night with intent to commit theft.

The last point taken is the question of sentence. There I see no reason to interfere.

I dismiss the application.

Application dismissed.

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July, 27.

Before Mr. Justice Stuart.

IN THE MATTER OF THE PETITION OF NARAIN PRASAD NIGAM.*

Code of Criminal Procedure, section 435—Revision—Practice—Application made by a third party on behalf of convicts who had a right of appeal but refused to exercise it.

Although the High Court has power to interfere in revision, on a matter which calls for its interference being brought to its notice in any manner whatsoever, not necessarily by means of an application on the part of a person convicted,—yet, where the convicted persons concerned, who might have appealed but did not appeal or apply for revision, because they denied the jurisdiction of the Court which tried and sentenced them, were all of full age and more or less well educated, the Court should be loath to take action on an application for revision presented as a third party on his own responsibility and without authority from the convicts on whose behalf it was presented.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *A. P. Dube*, for the applicant.

STUART, J.:—This application in revision is of an unusual kind. Fifty-five persons were convicted, on the 19th of December, 1921, under section 17 (2) of the Criminal Law Amendment Act (No. XIV of 1908) and sentenced to various terms of imprisonment and fine. The imprisonment was, in some cases, rigorous and, in some cases, simple. These persons could have appealed. They did not appeal. The period of appeal has long since expired. On the 26th of July, 1922, something more than seven months after their convictions, this application has been put in in revision, not by these persons, but by a practising pleader of Cawnpore called Babu Narain Prasad Nigam, on their behalf, suggesting that the convictions be set aside. The learned counsel, who appears for Babu Narain Prasad in support of this application, has stated very frankly that the fifty-five persons in question, who were convicted, have not themselves applied to this Court and that they, in no way, approach the Court on the subject of the legality of the convictions passed against them, or the legality of the sentences passed upon them, or the severity of those sentences. These fifty-five persons apparently have deliberately refrained from taking any action in this matter, either by way of appeal or revision, but Babu Narain Prasad Nigam has applied on their behalf (I am given to understand, without their consent) in what he considers to be the public interest.

I give, in the first place, my considered opinion that a court should be loath to interfere on behalf of a person convicted in a criminal case, if that person is an adult and of ordinary

* Criminal Revision No. 895 of 1922, from an order of K. N. Sahai, District Magistrate of Allahabad, dated the 19th of December, 1921.

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intelligence, when that person himself, in no way, contests the propriety of his conviction. The learned counsel, who has argued this application, informs me that all these fifty-five persons are adults, that they are all of full mental capacity, and that the majority (if not all of them) are men of education above the average. They have refused to move the Court, and, from the decision with which I am asked to interfere, it appears that they refuse to recognize the existence of any court established by the British authority in India. I presume they include the High Courts among other tribunals. I am, therefore, asked in this revision to look into the matter on behalf of persons, who not only have not requested me to look into the matter on their behalf but who, as far as I can see, refuse to recognize my authority or my existence. This appears to me a somewhat amazing situation. However, it has been urged upon me that in the interests of justice I should at least read the judgment which it is proposed to set aside. Of course it is perfectly clear that under the very extensive powers contained in section 435 I can call for and examine the record of proceedings, if the necessity for doing so has been brought to my notice in any manner. Mr. Nigam has as good a right to bring the matter to my notice as anybody else in India, and, if I so desire, I can undoubtedly send for the record. But before I do so, it would be necessary for me to be satisfied that there are *a priori* grounds for apprehending a miscarriage of justice. My position is simply this. Mr. Nigam has brought the matter to my notice and filed a copy of the judgment. The matter might equally well have been brought to my notice by a paragraph in a newspaper or a placard on a wall or an anonymous post-card. It would be open to me, on information contained in a newspaper, a placard on a wall or an anonymous post-card, to take action if I considered that sufficient grounds were established to justify my so doing. So the case here stands. The judgment has been brought before me and read to me. I have heard the learned counsel's arguments. One of the arguments, which I have heard, contains the assumption that there can be no evidence upon the record except that to which the Magistrate refers in his judgment. That assumption is, of course, unjustified. The remaining points taken are points of a technical nature. They might have been interesting points to argue if the persons in question had appealed, as they had a right to appeal, but they are not points to which I should be disposed to attach the slightest importance in an application

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for the accused by the convicted person himself, and I certainly do not attach the slightest importance to them when suggested, as they are suggested, not by the persons convicted but by a gentleman who has not satisfied me, in any way, as to his responsibility, and who admittedly has no authority on behalf of the persons convicted. There is nothing to show that there has been any miscarriage of justice. In these circumstances I have no hesitation in rejecting this application, which I reject accordingly.

Application rejected

APPELLATE CRIMINAL.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Piggott.

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EMPEROR v. SIPAHI SINGH AND OTHERS.*

Act No. XLV of 1860 (Indian Penal Code), section 302 [and Criminal Procedure Code, section 307]—Murder—Concerted attack by men armed with lathis

Where a number of men armed with *lathis* make a concerted attack upon another man and practically kill him on the spot, all inflicting blows on the head, the result of blows which must have been clearly intended the intention to kill, or, at any rate, with the intention to cause [illegible] as the strikers must have known to be imminently likely to cause death of the person attacked, [illegible] *Empress v. Rara Nero* (1) followed.

Munshi *Sarkar Bahadur Joshi*, for the appellant.

The Government Advocate (Babu *Lalit Mohan Banerji*) for the Crown.

MEARS, C. J. and PIGGOTT, J.—Eight persons, [illegible] cousin-fellows and relatives, residents of village Dilai, near Karchhana, in the southern part of this district, were tried before the Sessions Judge at Allahabad, on charges under section 302 and section 147 of the Indian Penal Code. The charge of rioting may be disregarded, more particularly in view of the fact that one of the accused persons, Shoratan Singh, has been acquitted by the Sessions Court, on the ground that the evidence implicating him in the affair is not altogether satisfactory. The other four accused, Sipahi Singh, Sunder Singh, Bisheshar Singh and Bira Singh, have been convicted under section 302 of the Indian Penal Code. The learned Sessions Judge, while admitting that the question of sentence is one of some difficulty, has passed sentence of death on

* Criminal Appeal No. 514 of 1922, from an order of [illegible], Sessions Judge of Allahabad, dated the 30th of June, 1922.

(1) (1918) I. L. R., 38 All., 596

Sipahi Singh, and submitted the record to [illegible] formation of the same. He [illegible] transportation for life on the other three accused, but [illegible] the same time, remarked that he would leave [illegible] their case to the Local Government for [illegible] regard to the exercise of the prerogative of mercy.

The broad facts of the case are [illegible] there was a considerable variation in general outline between the story told by the accused and that for the prosecution. We have been taken through the evidence on the record and, where the two versions differ, we have no doubt that the learned Sessions Judge was right in giving the preference to that put forward by the witnesses for the prosecution. It appears that Raghubar Singh and Raghu Prasad Singh, two brothers, neighbours of the accused, had in possession a number of goats belonging to the appellant. On the 23rd of March last, the day before the events referred to in the charge, the [illegible] the pound, and the evidence [illegible] Indrdar Singh drove them [illegible] abusive language and declaring openly he was revenged by impounding forcibly any cattle belonging to Raghubar Singh or Raghu Prasad Singh who [illegible] On the following morning, according to the evidence of Raghu Prasad Singh he was grazing a number of cattle in a field where he had a perfect right to do so. Sipahi Singh and Sunder Singh came up from one direction. The other two accused, in the company of Shivratan, [illegible] acquitted, came up from another. They had lathis in their hands. They overawed the witness [illegible] and drove off his cattle in the direction of [illegible] ran towards the village calling for help. Raghu Prasad Singh. The latter came up. There is some conflict of evidence as to whether he was armed or not. But the Sessions Judge has himself accepted the statement that he had at least a stick in his hand. At any rate when he came up to the accused and endeavoured to stop the wrongful and forcible impounding of his cattle, Sunder Singh and Sipahi Singh struck him to the ground. The witness says that the other also struck him after he had fallen, and the injuries to the back and on the buttock disclosed by the *post mortem* examination corroborate this statement. When the witness Raghu Prasad Singh,

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protested, he was himself set upon and felled to the ground. This is substantially the story told in the first report and it is corroborated by several eye-witnesses, Raghunath Singh, Ram Nath Singh, Bandhu Singh, Jaipal Singh and Mangal Singh. Raghubar Singh was so seriously injured that he died the same day; Raghu Prasad Singh received a number of injuries, but only one of them was technically grievous; still he had evidently been subjected to a severe beating. The medical evidence shows that the injuries on the person of Raghubar Singh were serious; there were about eleven injuries on the body. The learned Sessions Judge has understated the number in summing up the case in his judgment, and three of these were on the head; the left parietal bone was fractured.

On this state of facts it has been contended before us that the learned Sessions Judge ought not to have found any of the accused persons guilty of the offence of murder. The argument is that it is not to be inferred that they intended to kill Raghubar Singh. The learned Sessions Judge has gone into this matter carefully in his judgment, and we are in thorough agreement with the general principles laid down by him. A similar case was before this Court in *Emperor v. Nanku* (1), and that decision contains, in our opinion, a correct statement of the law on this point. There was not, in the present instance, a sudden fight, in the heat of passion on a sudden quarrel. The accused persons were the aggressors from the beginning, and in carrying off to the pound cattle illegally seized by them and in making a violent attack upon a single man who endeavoured to interfere with their proceedings, they were behaving in an altogether outrageous and lawless manner. The nature of the injuries inflicted, and particularly the injuries to the head, justifies the inference that the persons who struck those blows intended, when striking them, to cause death. We are not disposed to interfere with the sentence passed upon Sipahi Singh. In cases like the present, where a number of men armed with *lathis* make a concerted attack upon another man and practically kill him on the spot, inflicting injuries to the head, the result of blows which must have been struck either with the intention to kill, or, at any rate, with the intention to cause hurt such as the strikers must have known to be imminently likely to result in the death of the person struck, we think it should be clearly laid down that,

(1) (1918) I. L. R., 35 All., 505

in the case of the ring-leader [illegible] penalty prescribed by the law [illegible] of murder will be inflicted. [illegible] lants we are prepared to endorse [illegible] the recommendation of the learned [illegible] extent. As in a case of this [illegible] expects this Court to pronounce [illegible] proper sentence, in the event of the prerogative being exercised, we propose to do so. The result is that we dismiss the appeals of all the appellants.

Appeals dismissed.

APPELLATE CIVIL.

Before Sir Grimwood Mears, Kt., Chief Justice, and Mr. Justice Piggott.

GAJADHAR MAHTON (PLAINTIFF) v. AMBIKA PRASAD AND OTHERS (DEFENDANTS).*

Civil Procedure Code, s. [illegible] tion of interest subsequent to the date of decree.

In calculating, for the purpose of [illegible] to the Privy Council, the value of the [illegible] for sale on a mortgage, interest *pendente lite* must up to the date fixed by the decree for payment should be included.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. S. M. Sulaiman and *Pandit Kashi Nath Katju* for the appellant.

Dr. Surendra Nath Sen, for the respondents.

MEARS, C. J. and PIGGOTT, J. The application in this case applies for leave to appeal to His Majesty in Council on the ground that the value of the subject-matter in dispute on the appeal is more than Rs. 10,000. The plaintiff instituted the claim out of which this appeal arises for Rs. 9,000 on a mortgage, and claimed interest upon the mortgage up to the date of the institution of the plaint. The plaint then contained a prayer that interest *pendente lite* might also be awarded and future interest to the date of payment. The learned subordinate Judge gave a decree for Rs. 9,000 only, and then added the [illegible] amount of interest which was due from the date of the institution of the suit to the expiry of the period of limitation provided for in order XXXIV, rules 2 and 4. The learned Judge

* Application No. 7 of 1923 for leave to appeal to His Majesty in Council.

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CHANDHAR MARTON v. AMBIKA PRASAD TIWARI.

calculation was that he added Rs. 69-4-0 to the already mentioned sum of Rs. 9,307-8-0. The addition of these two sums exceeds Rs. 10,000.

Dr. Sulaiman has argued before us that the value of the subject-matter in suit means the amount for which the plaintiff is contending. On a fair reading of the plaint, the plaintiff in this case was contending for Rs. 9,507-8-0. Equally he was asking that interest at the agreed rate should continue from the date of the plaint down to the date of the decree and equally he was asking that in the event of his getting a decree, interest should be calculated on the period of six months subsequent to the decree, within which time the defendant would have to pay the decretal amount. It is true he was able to put a liquidated amount of Rs. 9,307-8-0 in the plaint because that was a mere matter of the addition of interest to the principal. If the case had been fixed for a definite date, some three, four or six months ahead, he would equally have been able, if he had chosen, to fix the amount of *pendente lite* interest, and there would have been no difficulty to his adding an ascertained sum for the six months' interest [illegible] decree, and, in that way, he could have formulated a claim which would have exceeded Rs. 10,000.

We are of opinion that in a case of this [illegible] all that is sought to be added to the definite ascertainable amount at the date of the filing of the plaint is interest *pendente lite* and the amount provided for under order XXXIV, rules 2 and 4, if those three amounts when added together exceed Rs. 10,000, the case is one within the section. In those circumstances, being satisfied that the case fulfils the conditions provided for by section 110 of the Code of Civil Procedure, we grant leave to appeal to His Majesty in Council.

Application granted.

REVISIONAL CRIMINAL.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Piggott.

CHHOTE LAL v. CHHEDI LAL.*

Act No. V of 1861 (Police Act), section 4—Criminal Procedure Code, section 195 (1)(a)—Sanction to prosecute for false information.

For the purposes of section 195(1)(a) of the Criminal Procedure Code, the Superintendent of Police of a district is subordinate to the District Magistrate, in accordance with section 4 of the Police Act. *Queen-Empress v. Shib Singh* (1), followed. *Ramasamy Ayyan v. Queen-Empress* (2) and *Empress v. Sorada Prosad Chatterjee* (3), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *G. W. Dillon* and Babu *Sasla Nath Mukerji*, for the applicant.

Mr. *A. P. Dube*, for the opposite party.

MEARS, C. J. and PIGGOTT, J.:—This application originally filed as one in revision against an order passed by the Sessions Judge of Etawah, refusing to interfere with the order of a gentleman holding the office of Deputy Magistrate of the district of Etawah, whereby he refused to set aside an order passed by the Superintendent of Police of the district, contrary to the opinion of the said Superintendent, giving his sanction for the prosecution of the applicant Chhote Lal, upon the allegation that the said Chhote Lal had committed an attempt of the lawful authority of the Police Officer in charge of a certain police station in that district by giving the said Police officer false information, with such intent as to make the giving of the information an offence punishable under section 182 of the Indian Penal Code. The Sessions Judge was perfectly right in refusing to interfere. If the District Magistrate had authority to grant the sanction in question, he had that authority in virtue of the provisions of the Police Act, No. V of 1861, section 4. He was not acting as the presiding officer of the court of a District Magistrate constituted under the Code of Criminal Procedure, Act No. X of 1882. The Sessions Judge rightly appreciated this fact and held that he had no jurisdiction to interfere. One of us was responsible for admitting the application, and, at the time of its admission, the suggestion was thrown out that the order of the Sessions Judge might be correct and yet the order of the District Magistrate a bad one. Upon this suggestion a further applica-

* Criminal Revision No. 337 of 1922, from an order of Pandit Nath Banerji, Sessions Judge of Mainpuri, dated the 13th of May, 1922.

(1) (1904) I. L. R., 27 All., 223.
(2) (1906) I. L. R., 33 Calc., 452.
(3) (1904) I. L. R., 32 Calc., 180.

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in revision has been filed, which assails the order of the District Magistrate direct. This was not the intention with which the suggestion above referred to was thrown out [illegible] of the District Magistrate, not being that of a court which is not in itself subject to the revisional jurisdiction of this Court. What was contemplated was that, on proceedings being taken upon this order of sanction, the person accused, or sought to be prosecuted, might have pleaded before the court seeking to take cognizance of the matter that the said court had no cognizance because of the invalidity of the alleged sanction. If proceedings had gone this length an issue of law would have been raised in a court of subordinate jurisdiction to this Court and the opinion of this Court might have been sought by way of an application in revision. As the matter stands, however, we think it expedient to deal directly with the question sought to be raised. The real question in issue is whether the Superintendent of Police of the district of Etawah is or is not subordinate to the District Magistrate of Etawah, within the meaning of section 195 (1) *(a)* of the Code of Criminal Procedure. There is clear authority of this Court for answering this question in the affirmative; *—Emperor* v. *Shib Singh* (1). That authority has not, so far as we are aware, been challenged in this Court for some 18 years. Moreover, it seems to us that the words of the relevant section of the Police Act, referred to by the learned Judge who decided that case, do have the force and meaning which he ascribes to them; that is to say, they do make the Superintendent of Police of a district subordinate to the Magistrate of that district. There is one authority of the Calcutta High Court to the contrary, *Ramasary Lall* v. *Queen-Empress* (2). It was referred to by the learned Judge of this Court who decided *Emperor* v. *Shib Singh*. We are by no means clear that the learned Judges of the Calcutta High Court have not to a considerable extent changed their view of the matter; *vide* the subsequent decision in *Emperor* v. *Sarada Prosad Chatterjee* (3). At any rate it is sufficient for us to say that we find ourselves in general agreement with the view taken by Sir GEORGE KNOX in *Emperor* v. *Shib Singh* (1). We reject both these applications. The stay order passed at the time when they were admitted is discharged.

(1) (1904) I. L. R., 27 All., 201.
(2) (1900) I. L. R., 27 Calc., 452.
(3) (1904) I. L. R., 32 Calc., 180.

EMPEROR v. PARTABIR.

Act No. XLV of [illegible] Penal Code, [illegible] Extortion [illegible] [illegible] Corp

A cloth-seller was threatened with the [illegible] continued to sell foreign cloth. He [illegible] enforce payment of the fine, he [illegible] a certain amount of business and ultimately paid [illegible]

Held that the person responsible for the [illegible] convicted under section 385 of the Indian Penal Code, [illegible] might very well have been [illegible] under section [illegible]

THE facts of this case are fully set forth in the [illegible] of the Court.

Mr. *L. P. Dube*, for the petitioner.

STRAIGHT, J.: This application in revision [illegible] the following facts. On the 20th of April, [illegible] market day in the town of [illegible] district, Badan Lal, a cloth-merchant, [illegible] now in his shop. The applicant [illegible] the shop of Badan Lal and [illegible] to sell foreign cloth, which [illegible] prevent his doing so. Badan Lal replied [illegible] foreign cloth was available, he would sell it [illegible] and his companion then told him that, if he [illegible] he fined 5 per cent. of the value of his [illegible] pay the fine and packets were accordingly put up [illegible] who, apparently without using actual violence, [illegible] effectively any customer touching the shop of Badan Lal [illegible] a matter of two hours. Owing to the [illegible] two hours' trade and the consequent profit [illegible] he paid the fine, obeyed the order not to [illegible] was left unmolested for the future. He [illegible] the police and the Tahsildar. [illegible] incident of the [illegible] April [illegible] person [illegible] [illegible] goods [illegible] [illegible] not deal with [illegible] The [illegible] Magistrate [illegible] [illegible] Now [illegible] [illegible] and [illegible] convicted [illegible] [illegible] [illegible] [illegible]

The words of section 383 are these :—

"Whoever, in order to the committing of extortion, puts any person in fear, or attempts to put any person in fear, of any injury, shall be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both."

The definition of "extortion" is given in section 383 as follows :

"Whoever intentionally puts any person in fear of injury to that person, or to any other, and thereby dishonestly induces the person so put in fear to deliver to any person any property or valuable security or anything signed or sealed which may be converted into a valuable security, commits extortion."

The word "injury" is defined in section 44 :—

"The word 'injury' denotes any harm whatever illegally caused to any person, in body, mind, reputation or property."

The first point is what injury, if any, might have been apprehended by Bachan Lal. I am leaving out of account the loss of profit. It is an arguable point whether such loss of profit was or was not an injury under section 44. I express no opinion on that point. There is next the more important factor in this case of the fine which Bachan Lal was compelled to pay. There can be no doubt to my mind that injury in a legal sense was not only apprehended by him but caused to him by paying that fine. There was further a reasonable apprehension of personal violence. What then did the applicants do? They intentionally put Bachan Lal in fear of injury. Their action would clearly suggest to Bachan Lal that if Bachan Lal did not do what they wanted, Bachan Lal would not only suffer in business and in pocket but might suffer in person. No other common-sense view is possible. The learned counsel for the applicant addressed me on the subject of what he called peaceful picketing and referred to what he stated was the practice in England. I do not consider that a discussion of the English practice, even if correctly stated by him, would assist me in arriving at a decision. In India any man who is told that he is going to be picketed peacefully has every reason for apprehending possible physical discomfort as a not unlikely result. It is clear that Bachan Lal was put in fear of injury to his person. He was also put in fear of injury to the actual money in his till, for if he did not pay the fine at once, he had every reason for supposing that the fine might be increased. It is clearly made out on facts that the applicant intentionally put him in fear of that injury. What was the result? Bachan Lal was thereby induced to pay up the fine. Was he dishonestly induced?

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He was clearly dishonestly induced within the meaning of the law, for the word "dishonestly" is defined in section 24 of the Code as follows:—

"Whoever does anything with the intention of causing wrongful gain to one person or wrongful loss to another person, is said to do that thing 'dishonestly'."

Wrongful gain is gain by unlawful means of property to which the person gaining it is not legally entitled. Wrongful loss is the loss by unlawful means of property to which the person losing it is legally entitled. These are the definitions in section 23. Now it is clear that the applicant or anybody else was not entitled to that fine which was taken from Bachan Lal, and it is equally clear that Bachan Lal was legally entitled to the money which he paid as that fine; and the means used, being threats directed against the man's business explicitly and against his person impliedly, were unlawful. So I find that every ingredient in the offence of extortion was made out and the conviction might very well have been under section 384 for the actual commission of the offence. The conviction under section 385 is equally good. Bachan Lal was put in fear of injury in order to the commission of extortion. The conviction is thus a good conviction.

I wish to be clearly understood upon the subject of picketing. The point is not whether picketing in itself is illegal. I do not propose to discuss this large subject exhaustively. "Picketing" is not, as far as I know, a word that has ever been legally defined. It may have been, but I am not aware of it. The word means different things to different people. If all that is meant by picketing is that a certain number of well-intentioned and law-abiding persons wish to argue in a legitimate and peaceful manner with a man, pointing out to him that in his own advantage he should not follow a certain course, there can be no doubt that such a procedure is not only harmless but, in many cases, it may be laudable, and if picketing to the ordinary mind meant nothing more than that, the fear of picketing would not be fear of injury within the meaning of the law. But when unfortunately, the word picketing has come to be associated with another word "boycotting," and when the boycotting is not to proceed from ostracism to active annoyance and when the active annoyance has been known, in many instances, to culminate in bodily injury, then I take it that a man who is threatened with picketing and knows that picketing can be of such a nature is put in fear of injury within the meaning of section 385. I

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could never be suggested that a person could legally be put in fear of injury because he had been told that a respectable gentleman, who was the exponent of advanced religious views, was coming to discuss his views with him. That would not put anybody in fear of injury legally. But when a man is told that certain men are going to wet his shop and he knows that, in many instances, the watching of shops not only leads to loss of business but has frequently led to loss of actual money and occasionally to personal injury to the shop keeper, he legally must apprehend injury. If I considered that the matter were otherwise than perfectly plain, I should have admitted this application upon the point of law, but, to my mind, the matter presents no difficulty. With regard to sentence, I see no reason to interfere. I dismiss the application.

Application dismissed.

1922

August, 8.

Before Mr. Justice Stuart.

RAM BILAS v. LACHMI NARAIN.*

Code of Criminal Procedure, section 195(b)—Sanction to prosecute—Necessity of sanction in respect of abetment also.

In the case of offences to which reference is made in section 195, clause (b), a court taking cognizance of such an offence when that offence has been committed in, or in relation to, any proceeding in any court, or a court taking cognizance of a criminal conspiracy to commit such an offence or of abetment or attempt to commit such an offence, cannot do so unless sanction has been given, not only to the *factum* but to cover the case of each person who is charged with having committed it.

THE facts of this case sufficiently appear from the judgment of the Court.

MR. *G. P. Boys* and Maulvi *Muhammad Abdul Aziz*, for the applicant.

Mr. *G. W. Dillon* and Babu *Saila Nath Mukerji*, for the opposite party.

STUART, J.:—The point raised in this application is as follows:—A certain Rameshar Das swore to the contents of an affidavit in the court of the District Judge of Cawnpore in support of an application for transfer of a civil suit.

The other side applied for sanction to prosecute Rameshar Das for having sworn false allegations in that affidavit. The District Judge refused this sanction but the High Court granted it.

Rameshar Das is under trial in respect of the matter. In connection with that trial Lachmi Narain has instituted criminal proceedings against Ram Bilas, the employer of

* Criminal Revision No. 380 of 1922.

Rameshar Das, on the ground that Ram Bilas abetted the commission of the offence committed by Rameshar Das.

The Joint Magistrate has taken cognizance of the case as against Ram Bilas, holding that section 195 of the Criminal Procedure Code has no application to the case.

It has been held by this Court, amongst others, that when an offence described in section 463, or sections 471, 475 and 476 of the Indian Penal Code has been committed by a person who is not a party to any proceeding or given evidence in such proceeding, the provisions of section 195 have no operation, and it was upon the authority of these views that the Joint Magistrate apparently took the course which he has taken. But the provisions of section 195, clause (*b*), differ materially from the provisions of the same section clause (*c*).

It is true that section 195 (3) applies to both, but as I read the authorities on section 195 (*c*), no question of abetment ever arose in the recorded cases when the accused person was not a party to the proceedings in the court. It was not in those cases necessary to discuss whether the offence charged was a substantive offence or the abetment of a substantive offence. If the person accused was not a party to the proceedings in court, the provisions of section 195 (*c*) would certainly not be applicable, as those provisions refer only to charges against the parties to the proceedings, and no sanction would be necessary. But in the case of offences to which reference is made in section 195, clause (*b*), I consider that a court taking cognizance of such an offence when that offence has been committed in, or in relation to, any proceeding in any court, or a court taking cognizance of a criminal conspiracy to commit such an offence or of abetment or attempt to commit such an offence, cannot do so unless sanction has been given not only to the *factum* but to cover the case of each person who is charged with having committed it.

The accused person, it is true, need not be named but he must be indicated. For the above reasons, I am of opinion that the Joint Magistrate's court cannot take cognizance of the offence charged against Ram Bilas without the sanction of the District Judge or of the High Court.

I, therefore, direct the Joint Magistrate to refrain from taking proceedings against Ram Bilas and I quash the said proceedings.

Proceedings quashed.

Before Mr. Justice Stuart.

1922
August, 18.

EMPEROR v. GOKAL AND [illegible] *

Act No. XLV of 1860 (Indian Penal Code), sections 323/325, 332 and [illegible] — Arrest made both [illegible] — Offence committed by excess.

Two constables in the bona fide execution of their duty carried out an arrest under a warrant which contained a clerical error in fact not readily [illegible]. When the constables came to execute the warrant the prisoner said [illegible] on the warrant but did not cause him to be arrested. *Held* that the accused were not liable to punishment under sections 323/325 and 332 of the Indian Penal Code, but should have been convicted under section 225.

This was a reference from the Sessions Judge of Moradabad.

The facts were not represented.

The facts of the case are thus stated in the following referring order :—

In this case Emrat Chankidar, Gokal, Lekram and Nandan Lal were charged with offences under sections 323/325 and 332 I. P. C. [illegible] the prosecution was that two constables, Bhagwandas and Mohan Lal [illegible] were not liable to punishment under section 323/325 and 332 the [illegible] Piari in connection with a case under section 498, I. P. C. A warrant for her arrest had been issued by the court of the Bench Magistrates of Bilari. Musammat Ram Piari was found in the house of the accused Lekram and was arrested, whereupon the other accused came there and the prisoner seized the constables and rescued the woman. The learned Magistrate has sentenced the accused under section 332 I. P. C. [illegible] has sentenced Emrat Chankidar to one month's rigorous imprisonment and the other three accused to a fine of Rs. 50 each. He found that the warrant under which the arrest of the woman was made was a [illegible] and was readily, no offence under section 225B was caused. The accused were [illegible].

It is pointed out with regard to the case of the [illegible] that the accused were technically entitled to succeed [illegible] evidence whatever on the point [illegible] the Sessions Judge was committed. When the evidence shows that the constables were [illegible] that a scuffle took place. There is nothing to show that any [illegible] disease or infirmity was caused to such [illegible] the intention of doing so. This being so, I [illegible] the accused have been wrongly convicted. The record will be submitted to the [illegible] Court with the recommendation that the conviction be set aside.

STUART, J. I do not agree with the learned Sessions Judge that no offence was committed. Upon the facts the four persons convicted clearly used criminal force. I am not disposed to go out of my way to find technical excuses for persons who use criminal force towards constables acting [illegible] formally within the scope of their authority. The circumstance that the warrant which they were endeavouring to execute contained a technical defect, which the constables could not possibly have any idea of, would affect the matter only this much that it renders the persons convicted not guilty of a more serious offence. They have already been found not guilty of that offence. The section of the penal code [illegible]

* Criminal Reference No. 429 of 1922.

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EMPEROR v. GOKAL.

that they had to obey orders. The persons convicted had not the vaguest idea that the warrant contained a technical defect but used criminal force to prevent the warrant being executed. I change the convictions from section 323 to convictions under section 352 and uphold the sentences. If Enayat has been released on bail, he will surrender to his bail and serve the remainder of his sentence of one month's rigorous imprisonment.

Conviction altered.

Before Mr. Justice Stuart.

EMPEROR v. KALE.*

1922

September, 13.

Jurisdiction—Review of judgment—Power of High Court to revise its own order in a criminal appeal.

The High Court has no power to review its own order dismissing a criminal appeal and confirming the conviction and sentence.

THIS was a reference made by the Sessions Judge of Meerut on a motion made by the District Magistrate, suggesting that, owing to the discovery of certain new evidence, the conviction of one Kale, or Barati, was doubtful if not wrong.

The parties were not represented.

The facts of the case are thus detailed in the Magistrate's order:—

"I refer the case to you of one Kale alias Barati, Shaikh, who was convicted by Mr. Neave, Sessions Judge of Meerut on the 18th of November, 1921, under section 395, I. P. C. and was sentenced to 10 years' rigorous imprisonment. I forward in original a lengthy and detailed report from the Superintendent of Police on the subject of this case. I also forward statements, which I have recorded, made by (1) Rafi and (2) Sub-Inspector Triloki Narayan who investigated the above dacoity case. I also forward the identification proceedings held in Agra Jail on the 18th of August, 1922, which show that Rafi failed to identify the above Kale or Kale Khan alias Shubrati or Barati.

"The point of making this reference is that since the conviction of Kale alias Barati on the 18th of November, 1921, one Rafi was arrested in Delhi. Rafi made a long detailed confession concerning a large number of dacoities committed in the Meerut district by himself and his associates. Amongst the dacoities mentioned by him was this identical dacoity for which Kale alias Barati was convicted. The confession of an

* Criminal Reference No. 149 of 1922.

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admitted bad character may be worth much or little. In this instance the confession of Rafi has been tested in the most thorough, searching, and satisfactory manner possible by the deputation of a Deputy Magistrate, Mr. Harpal Singh, to go round with the Police Inspector, Mr. Abdulla Khan, to the scenes of the various dacoities mentioned by the approver, and make notes of all he said and did. As a result of this searching test, the confession of Rafi has been proved true up to the hilt. He has been found wrong in practically nothing. With regard to this particular dacoity, he states definitely that Kale alias Barati was not one of the dacoits and he does not know him. He has failed to identify him at the Agra jail. There is nothing to show collusion between the two, for Kale alias Barati was arrested and convicted some months before Rafi was arrested in Delhi in the month of March, 1921."

"Supposing that the dacoity case in question was at the present moment under investigation with the identification evidence by three persons, Umrao constable and the two other witnesses, and at the same time with the contradictory evidence of Rafi's statement, hitherto corroborated in all three cases, there can be no doubt that the police would be state very greatly before sending the case up to court and would almost certainly not challan the case.

"Similarly if Mr. Neave had had this additional evidence before him at the time he was writing his judgment, it is very probable if not certain that he would have modified the remark he made therein, viz., 'I am therefore disposed to accept the identification evidence as genuine.'

"It cannot of course be said even now that the identification was not genuine, but I think it is certain that no court would now under the circumstances decide at the very least to give the accused the benefit of the doubt.

"I, therefore, send the record of the case to you with the request that you will, after perusing the record of the case *King-Emperor* v. *Kale alias Barati alias Shubrati*, forward it to the Hon'ble High Court with the recommendation, if you agree with me, that the sentence passed on Kale alias Barati should be reversed and that he should be forthwith set at liberty."

STUART, J.:—This is an application from the Sessions Judge of Meerut requesting me to set aside a conviction passed by his predecessor and affirmed by PRIDEAUX, J., in appeal, on

the ground that on certain materials that have since come to the knowledge of the District Magistrate there is a doubt of the convict's guilt. 1922 EMPEROR v. KALE.

This is not a matter which I can possibly take up in revision. Even if I myself had passed the order dismissing the appeal I could not revise it and I certainly cannot revise the order of another Judge of this Court. There can be no revision in the matter.

I return the record to the District Magistrate in order that he may refer the matter to the Local Government who have power under Chapter XXIX of the Code of Criminal Procedure.

Before Mr. Justice Stuart.

EMPEROR v. J. JOHN.*

1922 October, 14.

Act No. XLV of 1860 (Indian Penal Code), sections 504, 323—Compounding offences—Continuance of trial after composition of a compoundable offence.

J., a Railway guard, abused and committed an assault of a trivial or technical nature on S. C., a passenger. S. C. made a complaint to the police and a case was instituted under section 120 of the Railways Act. Meanwhile J. offered an apology to S. C., who gave him the following document:—"This is to say that myself, guard, D. N. W. Railway, came to him and offered an unconditional apology before Dr. L. N. Rai, Assistant surgeon, Benares. I beg to withdraw the case against him." This was produced at the trial. The Magistrate acquitted J. of the charge under section 120 of the Railways Act but convicted him under sections 504 and 323 of the Indian Penal Code.

Held that this document clearly amounted to a composition of the offence committed by J., in so far as it was compoundable, and the Magistrate could not, therefore, charge and convict J. under sections 504 and 323 of the Indian Penal Code.

THIS was a reference made by the Sessions Judge of Benares. The facts of the case are fully stated in the following referring order:—

"The facts which give rise to this application are as follows:—A student named Sushil Chandra Chakravarti was travelling by train from Benares to Ballia. At Benares city station he asked the guard of the train, J. John, the latter abused him and assaulted him with his fists. Sushil Chandra made a complaint to the police, which was recorded. On this complaint a case was instituted under section 120 of the Railways Act. Four days later, on the 16th of July, John apologized to Sushil Chandra in the presence of Dr. L. N. Rai, Assistant Civil Surgeon. Sushil Chandra wrote out and gave to John a document which runs as follows: "This is to say

* Criminal Reference No. 420 of 1922.

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EMPEROR v. J. JOHN

that Mr. John, guard, B. N. W. Railway [illegible] to me and offered an unconditional apology to Dr. [illegible], Assistant Surgeon, Burdwan. I beg to withdraw the case against him.' This was signed, dated and given to the accused, who produced it in court on the following day.

"The Magistrate [illegible] the agreement of the 17th, but said that it was given 'for office only and not for court,' and that he wished the accused to be tried for [illegible]. He did not at first make a statement admitting the offence, but when charges were framed under section 120 of the Railways Act and sections 501 and 323 of the Indian Penal Code, he pleaded guilty to all. The Magistrate acquitted him of the charge under section 120 of the Railways Act, and found him guilty of offences under sections 501 and 323 of the Indian Penal Code and imposed a sentence of fine.

"It is pleaded that the offence had been compromised, and that, therefore, a conviction was illegal. The Magistrate appears to think that the agreement was not a compromise. He says it was a withdrawal, which can only be made by 'intimation to the Magistrate,' but he is led astray because the word 'withdraw' happens to be used in the agreement. It is not a withdrawal in the technical sense, as this can only be made by the prosecuting authority. Then he says that there is 'no consideration.' There is no provision of law which forbids the compounding of offences for an apology. In fact cases are constantly withdrawn when an apology is offered, in particular, cases of defamation or abuse. In my opinion the document Ex. B has only one meaning, namely that Sushil Chandra had accepted an apology and did not wish any further proceeding to be taken. Technically speaking, he had at that time no case to withdraw, but it is an offence, not a case, which is compounded. Once an offence is compounded, no court can take further action in the matter. In cases of a more serious nature the court can refuse permission to compound an offence, but not an offence of this nature, which is merely the use of offensive language and a more or less technical assault with a guard's flag. When Sushil Chandra gave the document Ex. B to John he compounded any offence which John had committed against him, and as far as their personal quarrel was concerned the Magistrate had no jurisdiction. He had still to go on with the case

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EMPEROR v. J. JOHN

under section 120 of the Railways Act, which could not of course be compounded by Sushil Chandra, who was merely a witness. If the Magistrate had found that an offence under the Railways Act had been committed, he could have disregarded Ex. B and sentenced the accused on his plea of guilty. For some not very clear reason, the Magistrate holds that section 120 does not apply to railway servants. I do not agree with the Magistrate. There is nothing to limit the scope of section 120 to the general public, any more than section 119, which undoubtedly includes railway servants. As the matter stands, however, the accused has been acquitted of the offence charged under section 120 of the Railways Act. Having acquitted the accused of the only offence for which there was a prosecuting authority, the Magistrate could not in my opinion legally charge the accused and convict him of offences under section 504 and section 323. The only person aggrieved, once the charge under section 120 of the Railways Act was dropped, was Sushil Chandra. He had, I consider, compounded the offence against him, and the court was therefore without jurisdiction in convicting and sentencing the accused

"I have not seen any ruling of the Allahabad High Court defining the word 'compound,' but my view of the document filed in the present case appears to be in accordance with the rulings of the Madras and Calcutta High Courts: vide *Mahomed Kanni Rowther* v. *Pattani* (1) and *Murray* v. *The Queen-Empress* (2).

"As I consider that the conviction was illegal I refer the matter to the Hon'ble High Court for any orders that may be considered necessary. The Magistrate will be asked to submit any explanation that he may wish forwarded within ten days."

On this reference—

Munshi *Bhagwati Shankar*, for the applicant.

Mr. H. *Sanyal*, for the opposite party.

STUART, J.:—Mr. *Sanyal*, for Sushil Chandra Chakravarti states that his client does not oppose the application. His client accepted the applicant's apology, and had no intention of proceeding with the case. He did not prosecute. He withdrew. The police, however, challaned under section 120,

(1) (1915) I. L. R., 39 Mad., 916.
(2) (1893) I. L. R., 21 Calc., 563.

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Railways Act, and he was [illegible] was acquitted under that section.

I accept the learned Sessions Judge's view. The conviction so far as the charges under section 353 and section 332 of the Indian Penal Code were concerned, was wholly unjustified.

I set aside the convictions and sentences and direct the fines, if paid, to be refunded.

APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

1923
October, 23

GHAFAR INDU and others (Decree-holders) v. ASGHAR ALI KHAN and others (Judgment-debtors).*

Civil Procedure Code, section 47, order IX, order XXI, rule 23—Decree for sale of property—application for execution dismissed for default—application for restoration—Appeal.

If a decree-holder's application for execution of a decree for the sale of property is rejected by way of an application for restoration, he does so apply and his application is dismissed, no appeal lies from such order.

Thakur Prasad v. Fateh Ali (1), *Hari Charan Ghose v. Nagendra Nath Sen* (2) and *Bal Mukund Das v. Ajodhya Prasad* (3), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. *Surendra Nath Sen*, for the appellant.

Mr. *S. A. Haidar*, for the respondent.

PIGGOTT and WALSH, JJ.:—This is an appeal by the decree-holder in an execution matter. In the form in which it comes before us, in consequence of the decision of the court below, it raises a simple question of law. On the 28th of May, 1921, an application for execution of a certain decree, which had been made on the 7th of April, 1920, was dismissed by the execution court on the ground that the decree-holder had failed to prosecute it with due diligence. On the 1st of June, 1921, the decree-holder presented to the court below an application, not described as falling under the provisions of any specified section or rule of the Code of Civil Procedure, but offering an explanation of the alleged default of prosecution and asking the court to restore the application of the 7th of April, 1920, to its file and to proceed with it as disposed according to law. The court below has rejected his application on

* First Appeal No. 2 of 1922, from an order of Pran Nath Ghosh, Subordinate Judge of Bareilly, dated the 2nd of July, 1921.

(1) (1894) I. L. R., 17 All., 106.
(2) (1913) I. L. R., 41 Calc., 1.
(3) (1918) 4 Patna L. J., 330.

the ground that the provisions of order IX of the Code of Civil Procedure have no application to execution proceedings, and that the decree-holder's remedy, if any, was to make a fresh application for execution of his decree. The authority quoted for this view of the law is the decision of the Privy Council in the case of *Thakur Prasad* v. *Fakir-ullah* (1). On the facts of this case is decisive against the decree-holder. He had no right in law to apply for the restoration of his application of the 7th of April, 1920, and, what is more, nothing in order XLIII, rule 1, clause (*c*) of the Code of Civil Procedure would give him any right of appeal against the decision of the court below rejecting his application. It has been contended before us that the decision of the Privy Council above referred to ceases to govern the case, by reason of the provisions of section 141 of the present Code of Civil Procedure, Act No. V of 1908, in which an explanation, which had been added by the amending Act No. VI of 1910 to section [illegible] of the Code of Civil Procedure, was omitted. The history of [illegible] somewhat curious, but we think [illegible] correct view is that taken by the Chief Justice of the Court, High Court in the case of *Hari Charan Ghose* v. *Manmatha Nath Sen* (2). This ruling has since been followed by the Patna High Court in the case of *Babu Ritu Kuer* v. *Maharaja Narain Singh* (3).

We think the decision of the court below was correct and, moreover, that no appeal lies against it. We dismiss this appeal with costs.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Stuart.

JAGANNATH (DEFENDANT) v. [illegible] (PLAINTIFF).*

Act No. IV of 1882 (Transfer of Property Act), s. [illegible]—Effect of a decree or order under the provisions of [illegible] subsequent mortgagee.

[illegible] which such decree [illegible] Khan (4), followed. *Sultan* [illegible]

* First Appeal from Order No. [illegible] Judge of Ghazipur, dated the 14th [illegible] of Hari Das [illegible] the 24th [illegible]

(1) [illegible]
(2) [illegible]
(3) [illegible]
(4) [illegible]
(5) 1921 [illegible]

1922 First Appeal [illegible]

JAGANNATH PRASAD v. CHHATUR KUNWAR.

[illegible]

[illegible] Asthhana and [illegible]

[illegible]

[illegible]

[illegible] given [illegible] [illegible] of [illegible] [illegible] Nand Ram on the 20th of April, 1906, hypothecating [illegible] the village of Kurara. Two years afterwards, on the [illegible] of May, 1906, he executed a deed of usufructuary mortgage in favour of Jagannath Prasad for Rs. [illegible] hypothecating by way of [illegible] village [illegible] [illegible] [illegible] Jagannath [illegible] to pay off the mortgage of [illegible] April, 1906, and the money for that purpose was left in the hands of Jagannath Prasad to pay off the prior mortgage [illegible]. The latter [illegible] for [illegible] mortgage [illegible] obtained a preliminary decree under [illegible] on the 11th of December, 1907, and a final decree on the 28th of August, 1908. In order to satisfy the said decree and save the property from sale, Musammat Jamn Kunwar executed a fresh deed of mortgage in favour of one Ram Narain on the 19th of February, 1910, [illegible] the [illegible] the hands of Ram Narain for the payment of the decree of the 28th of August, 1908. Ram Narain has paid off the decree of the 28th of August, 1908. He is dead. On the 28th of March, 1919, his widow Musammat Chhatur Kunwar instituted the suit, out of which this appeal has arisen, for the recovery of Rs. 1,700 plus interest due upon the mortgage of the 19th of February, 1910, in favour of her husband, by sale of the mortgaged property. Jagannath Prasad was also impleaded as a defendant in the case. He was the principal contesting defendant. The claim was resisted on various pleas, with one of which alone we are at present concerned here. He contended that he had priority over the mortgage of the 19th of February, 1910. On the other hand the plaintiff Musammat Chhatur Kunwar argued that her husband, having advanced money for the satisfaction of the decree of the 28th of August, 1908, and having satisfied the said decree, stood in the shoes of the prior mortgagee Nand Ram, whose mortgage

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with regard to the statement made by the learned counsel for Chhatar Kunwar before us that the amount claimed by Jagannath Prasad is not due to him, and any other plea that might be urged by either Chhatar Kunwar or Jagannath Prasad. The remand is under order XLI, rule 23. Costs here and hitherto will abide the result.

Before Mr. Justice Walsh and Mr. Justice Sulaiman.

1922 *October*, 24.

MUKARRAM ALI KHAN (PLAINTIFF) v. ANJUMAN-UN-NISA BIBI (PLAINTIFF AND ANOTHER) AND ALI MIAN (DEFENDANT).*

Muhammadan law. Waqf. Dedication for charitable purposes. For the reading of Fatiha and for charitable gifts. Invalidity. Bequeathing the maintenance of his poor relations and dependents. Validity. Muhammadan law.

A dedication of a property for the purpose of reading Fatiha and for charitable gifts is invalid. Bequeathing the maintenance of his poor relations and dependents is valid. Muhammadan law.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. *S. M. Sulaiman* and Dr. *Surendra Nath Sen*, for the appellant.

Maulvi *Iqbal Ahmad*, for the respondent.

MUHAMMAD RAFIQ and SULAIMAN, JJ.: The only point which requires decision in the present appeal is whether the property in dispute is waqf property or not. The plaintiff respondent, Mst. Anjuman-un-nisa, purchased the property in suit from Asghar Ali Khan, defendant respondent No. 2, on the 14th of November, 1917. Soon after her purchase she made an application to the Revenue Court for mutation of names in her favour. The defendant appellant, Mukarram Ali Khan, who is a cousin of Asghar Ali Khan, objected to the mutation of names in favour of the vendee on the ground that the property in respect of which mutation of names was sought was waqf property and hence the vendor of the plaintiff respondent No. 1 had no right to convey it.

Both parties gave evidence and the claim of the plaintiff was decreed. The decree of the first court was upheld in appeal. Mukarram Ali Khan has come up in second appeal before us and contends that the property in suit was dedicated prior to 1854 to certain charitable purposes and that the decisions of the court below as to the validity of the waqf are erroneous. It appears from the materials on the record that

* Second Appeal No. 1592 of 1920, from a decree of O. F. Jenkins, District Judge of Budaun, dated the 26th of July, 1920, confirming a decree of Priya Charan Agarwal, Munsif of Bisauli, dated the 2nd of February, 1920.

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there has been litigation in respect of this property prior to the present dispute. The former litigations were in 1901-1902 and 1915-1917. In the former litigation of 1901, which arose out of partition proceedings, the decision of the District Court was adverse to the contention of the defendant appellant. On the other hand, in the litigation of 1915-1917, which ended in this Court, the decision was in favour of the contention of the defendant appellant. Both parties to the present appeal call to their aid the decisions of 1902 and 1917, contending that the matter is *res judicata*. We think that the question of *res judicata* does not really arise in the present case as some of the parties to the former litigations were different. The real point, as we have already remarked, for consideration is whether the property in question is waqf. We find from the papers on the record that one Mardan Ali Khan was the owner of the property in suit and some other considerable landed property. According to the statement of the defendant appellant, he (Mardan Ali Khan) dedicated the property in suit to certain charitable and religious objects. After his death there was a dispute between his descendants and the matter was referred to arbitration. The award given by the arbitrators found the property now in suit as waqf property dedicated by Mardan Ali Khan for the purposes of charity, including maintenance of his relatives and his dependents, and for the reading of the *fatcha* for the salvation of his soul. Now we have to consider whether the above-mentioned objects would constitute objects of a valid waqf. The contention on behalf of the plaintiff respondent No. 1, the vendee, is that the dedication was really for the benefit of Mardan Ali Khan's descendants and for keeping the property in his family, and that the mention of the dependents, the charitable purposes and the *fatcha* was merely a pretence to evade the law under which a dedication for the maintenance of the members of a family was, at that time, invalid. We have given due consideration to the argument of the learned counsel for the plaintiff respondent No. 1 but we find ourselves unable to agree with him. We think that the real object of Mardan Ali Khan was to dedicate a portion of his property for the reading of the *fatcha* and for *umur-i-khair* (charitable purposes) including the maintenance of his poor relatives and dependents. Such a dedication is, it is not denied, valid under the Muhammadan law. The opinion of the learned Judge of the lower appellate court that the objects of the waqf were uncertain

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of the 27th of April, 1906, was prior to that of Jagannath Prasad. The contention of Jagannath Prasad was disallowed by both the courts below. He has come up in second appeal before us and argues that he has priority over Chhatur Kunwar. He bases his argument on the statement that the mortgage of the 27th of April, 1906, having merged into the decree of the 29th of August, 1908, both the mortgage security and the right of redemption were extinguished. The mere fact that the husband of Chhatur Kunwar advanced money for the payment of that decree and paid off that decree would not revive the mortgage of the 27th of April, 1906, and thus give Chhatur Kunwar priority over Jagannath Prasad. In support of his contention Jagannath Prasad relies on the cases of *Chhagan Lal* v. *Muhammad Husain Khan* (1) and *Het Ram* v. *Shadi Ram* (2). For Mussammat Chhatur Kunwar the contention is that the case of *Het Ram* v. *Shadi Ram* has been reconsidered by their Lordships of the Privy Council in a subsequent case, namely *Sukhi* v. *Ghulam Sattar Khan* (3). We find that in the last mentioned case the decision of their Lordships has turned upon the consideration of the question of the following words of section 89 of Act IV of 1882, namely, "and thereupon the defendant's right to redeem and the security shall both be extinguished." In the new Civil Procedure Code of 1908, in order XXXIV, rule 5, these words find no place. In *Sukhi's case* the final decree was passed under the new Act and not under Act IV of 1882. In the appeal before us the decree of the 29th of August, 1908, was passed and framed under section 89 of Act IV of 1882. In the case of *Chhagan Lal* v. *Muhammad Husain Khan* (1), which was a Full Bench case of this Court, it was decided that a final decree passed under section 89 of Act IV of 1882 had the effect of extinguishing both the security and the right of redemption. In other words, the mortgage in respect of which the decree was passed was extinguished. Mussammat Chhatur Kunwar in the present case cannot claim priority over Jagannath Prasad, in view of the decision in the case of *Chhagan Lal* v. *Muhammad Husain Khan*. We therefore allow the appeal, set aside the decrees of the courts below, and remand the case to the first court through the lower appellate court for trial on the merits. It will be open to the parties to put in fresh pleas

(1) (1919) I. L. R., 41 All., 456.
(2) (1918) I. L. R., 40 All., 407.
(3) (1921) I. L. R., 43 All., 469.

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and illusory, is not sound and is not supported by any valid reasons. We, therefore, hold that the waqf in question was a valid waqf. We allow the appeal and set aside the decrees of the courts below and dismiss the suit of the plaintiff respondent No. 1 with costs in all courts.

Appeal allowed.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Gokul Prasad.

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October, 26.

GHHIDDU SINGH AND OTHERS (PLAINTIFFS) v. JHANJHAN PAI AND OTHERS (DEFENDANTS).*

Act No. VII of 1870 (Court Fees Act), section 7(iv)—Court fee—Suit for redemption of mortgage where mesne profits are claimed—Jurisdiction—Valuation of suit.

When a suit is brought for redemption and a certain amount is claimed as surplus mesne profits, the plaintiff is not bound to pay court fees upon the surplus amount claimed, in addition to the court fee on the principal amount secured by the mortgage. *Hurdeo Rai v. Hasina Khatun* (1) and *Gopi Kishan v. Sarabjee* (2), followed.

Similarly, if the principal amount sued for is within the pecuniary limits of a munsif, that jurisdiction is not ousted if the plaintiff adds to the plaint a claim for surplus mesne profits which, if added to the principal amount sued for, would bring the total to an amount beyond the pecuniary limits. *Kedar Singh v. Mutabadal Singh* (3), referred to.

THE facts of this case sufficiently appear from the following order of the Court on the subject of the court fee payable:

Dr. M. L. Agarwala, for the appellants.

Munshi *Panna Lal*, for the respondents.

BANERJI and GOKUL PRASAD, JJ.: An office report has been put up before us in which it is said that the amount of court fee paid on the plaint was insufficient and that a further sum of Rs. 385 was payable on the plaint. Dr. *Agarwala* disputes the correctness of the office report and we have therefore to decide whether the amount of court fee payable on the plaint was or was not sufficient. The suit was one for redemption of a mortgage made in 1863. The principal amount secured by the mortgage was Rs. 960. It provided that the mortgagee was to remain in possession, appropriate the usufruct, deduct out of it the amount of interest payable on the mortgage which was at the rate of fifteen annas per cent. per mensem, and appropriate the balance towards the principal. The mortgagors remained in possession of a part of the property upon an undertaking to pay rent for that part

* Second Appeal No. 1250 of 1921, from a decree of Phul Chand Mocha, Subordinate Judge of Budaun, dated the 6th of May, 1921, modifying a decree of Priya Charan Agarwal, Munsif of Bisauli, dated the 19th of January, 1921.

(1) (1907) I. L. R., 30 All., 171 (175).
(2) (1921) 68 Indian Cases, 926.
(3) (1908) I. L. R., 31 All., 11.

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has not been drawn to any ruling in which a contrary view has been taken. It is true that in a certain [illegible] been held that, if a dispute arises in appeal as to the amount payable by or to the plaintiff, the appeal should be valued with respect to the amount claimed by the appellant and court fee ought to be paid on that amount, but that is not the question before us. The only question we have to [illegible] whether, when a suit is brought for redemption and a certain amount is claimed as surplus mesne profits, the plaintiff is bound to pay court fee upon the surplus amount claimed, in addition to the court fee on the principal amount secured by the mortgage. This question was decided in the cases to which we have referred and in these cases it was held that the suit being a suit for redemption, court fee was payable on the principal amount secured by the mortgage. We agree with the view taken in these rulings, which have, so far as we are aware, not been dissented from by this Court or any other court. In any case we feel ourselves bound to follow these rulings and hold that the amount of court fee payable in this case was rightly paid with reference to the principal amount secured by the mortgage.

On the appeal coming on for hearing on the 4th May the following judgment was delivered.

BANERJI and GOKUL PRASAD, JJ.: The only question which has been argued in this case is whether the court of first instance had jurisdiction to entertain the suit. The suit was one for redemption of a mortgage, the principal amount of which was Rs. 960. The facts of the case have been set forth by us in our order passed today upon the question of the amount of court fee payable on the plaint. In the plaint the prayer of the plaintiffs was that redemption should be granted upon payment of a portion of the mortgage money; in the alternative it was prayed that the plaintiffs might be allowed to pay the whole of the mortgage money; and in the third place it was alleged that a surplus amount of Rs. 7,00[illegible] due and it was prayed that this amount should be [illegible] against the defendant mortgagee. The plaintiffs, [illegible] who are the appellants here, took their plaint to the court of the Munsif in the belief that the Munsif had jurisdiction to entertain the suit. They allowed the suit to proceed [illegible] and a decree was passed by the Munsif for redemption upon payment of a certain sum. They themselves appealed to the

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BHRIGUNATH RAI v. APSARAIN RAI.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. *M. L. Agarwala* and Mr. *J. M. Banerji*, for the appellant.

Pandit *Uma Shankar Bajpai*, for the respondents.

BANERJI and GOKUL PRASAD, JJ.:—The plaintiff claimed joint possession of nine plots of land comprising 8 bighas and 13 biswas. He is one of the co-sharers in the village and is also the lambardar; the principal defendants are also co-sharers in the village. It was alleged that the defendants had forcibly turned out the non-occupancy tenants who cultivated these lands, that the tenants brought a suit for restoration of possession and that the matter was compromised and, in the end, the principal defendants took exclusive possession of the nine plots in question. The plaintiff as a co-sharer claims a declaration of his right to the lands in dispute and also joint possession. The courts below have decreed the claim for a declaration of his right but have refused to grant him joint possession. In our opinion, in so doing the courts below are in error. It is true that under certain old rulings of this Court, in a suit between co-sharers a decree for joint possession was refused, but in the recent course of rulings of this Court it has been held that a decree for joint possession ought to be granted. We may refer to the cases of *Bhairon Rai* v. *Sarab Rai* (1), *Jagarnath Ojha* v. *Ram Phal* (2), *Ishwar Singh* v. *Hanuman Singh* (3) and *Sarabjit Singh* v. *Raj Kumar* (4). The case last mentioned is almost exactly on all fours with the present case. In that case it was held that the plaintiff was entitled to a decree for joint possession. In the present case the learned judge of the lower appellate court has stated in his judgment that a decree for joint possession might lead to considerable difficulty and trouble by reason of the parties not being on good terms. In every case in which one co-sharer forcibly dispossesses another or keeps another out of possession, there is undoubtedly a good deal of bad feeling between them, but that is no reason for depriving a plaintiff of the possession to which he is entitled. No doubt there may be cases in which joint possession ought not to be granted.

(1) (1901) I. L. R., 26 All., 588.
(2) (1911) I. L. R., 34 All., 150
(3) (1921) I. L. R., 44 All., 1.
(4) (1921) I. L. R., 44 All., 5.

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were stolen on the 27th of November, 1921. [illegible] search for the missing buffaloes in the vicinity of the village, and, while so engaged in the search, about five days after the theft, he met Hargayan and some others at a village called Rampur. Hargayan and two others [illegible] proposal to Sri Gopal to the effect that if he would pay Rs. 200 to them and promised to pay Rs. 100 [illegible] ment of the money and took no steps to [illegible] they would get him back his stolen buffaloes. Sri Gopal did not accept the proposal, and brought the matter to the notice of the police, which led to the prosecution of Hargayan and two others. Hargayan alone was convicted. On appeal the learned Sessions Judge affirmed the conviction and the sentence, differing from the ruling of this Court reported in *Queen-Empress* v. *Chittar* (1). Hargayan, now applicant in this Court, contends that the learned Judge of the lower Court was in error in not following that ruling, and that the offence committed by Hargayan in making the proposal mentioned above. We have been told that the language of section 215 does not warrant the conviction of the appellant. The section is as follows:—

> "Whoever takes or agrees or consents to take any gratification for himself or any other person, by corrupt or illegal means, or by exercising personal influence, or on account of helping any person to recover any property of which he shall have been deprived by any offence punishable under the Indian Penal Code, shall, unless he uses all means in his power to cause the offender to be apprehended and convicted of the offence, be punished with imprisonment of either description for a term which may extend to one year, or with fine, or with both."

The argument is that the facts, as found by the courts below, do not show that Hargayan took any gratification or consented to take any gratification for recovering the stolen buffaloes. It is not denied that no money, as a matter of fact, passed hands, that the words "agree" and "consent" require two parties at least, and, therefore, no offence under section 215 was committed by the applicants. I think that it may be conceded to the learned counsel for the applicant that the substantive offence described in section 215 of the Indian Penal Code has not been brought home to the accused on the facts found by the courts below, but the finding of the courts below goes to show clearly that the applicant has been guilty of an attempt to commit the offence specified in section 215 of the Indian Penal Code. He could not have done anything more in order to be guilty of an attempt of the commission of the said offence than proposing to the owner of the

(1) (1893) I. L. R., 20 All., 389.

District Judge from the decision of the Munsif, and after the appellate court has decided the case and made a decree in favour of the plaintiffs for redemption upon payment of a certain sum, they have come to this Court and they urge that the Munsif ought not to have entertained the suit which they themselves instituted in his court. We think the case is covered by the ruling in *Kedar Singh* v. *Matabadal Singh* (1). It was for the plaintiffs to value the suit and they themselves valued it at Rs. 960, the principal amount of the mortgage. With reference to that valuation the suit was cognizable by the Munsif. They say that surplus mesne profits were due and they gave an estimate of the amount which they thought was due, but the relief sought in the plaint was that redemption should be granted and an account taken and, upon the taking of the account any surplus amount was found due, that surplus should be paid over to them. The real valuation of the suit was based on the amount of the mortgage, with reference to which court fee had to be paid, and it was an ancillary part of the claim that an account should be taken and any amount found due to or by one of the parties should be awarded to the party to whom it was due. That did not alter the nature of the suit and did not increase the value of it. This was the view taken in the case to which we have referred and we are not satisfied that a different view was held in any other case by this Court. It comes with very bad grace from the plaintiffs for them now to contend that they went to a wrong court and therefore all the proceedings which have already been taken in the suit should be quashed and a fresh trial ordered in another court. We think the appeal is without force and accordingly dismiss it with costs.

Appeal dismissed.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Gokul Prasad.

1923 December 27.

BHAGWANTH RAI (PLAINTIFF) v. APNARAIN RAI AND OTHERS (DEFENDANTS).*

Joint ownership—Exclusion of one co-sharer from possession of joint property—Nature of decree to which the person excluded is entitled.

Where one of several joint owners has been excluded by the others from possession of the joint property, he is entitled not merely to a declaration of his rights in regard to the property, but to a decree for joint possession: *Nihal Singh* v. *Sher Bahadur* (2), followed.

* Second Appeal No. 1366 of 1921, from a decree of J. J. W. Allsop, District Judge of Ghazipur, dated the 6th of August, 1921, confirming a decree of Hyder Hadi Ghosh, Munsif of Muhammadabad, dated the 14th of September, 1920.

(1) (1906) I. L. R., 31 All., 44.
(2) (1921) I. L. R., 43 All., 5.

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Some of these cases were pointed out in the ruling in *Jagarnath Ojha* v. *Ram Phal* (1), and a similar case is the case of *Watson and Company* v. *Ramchand Dutt* (2), referred to by the learned judge in his judgment. If a co-sharer were allowed to take possession to the exclusion of other co-sharers he would be able to convert land held under all the co-sharers by non-occupancy tenants into his own *khudkasht* and in this way he may usurp the whole of the land in the village and take actual possession of it. This certainly is not what the law contemplates. We think that the courts below were wrong in refusing to grant a decree for joint possession and that they ought to have followed the ruling in *Sarabjit Singh* v. *Raj Kumar* (3). We allow the appeal, vary the decrees of both the courts below and make a decree for joint possession in addition to the decree already made by those courts. The appellant will have his costs of this portion of the claim in the courts below and the costs of this appeal.

Appeal allowed.

REVISIONAL CRIMINAL.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Stuart

1922

October, 27.

EMPEROR v. HARGAYAN.*

Act No. XLV of 1860 (Indian Penal Code), sections 215 and 511—Attempt—Proposal to procure restoration of stolen property upon payment of money and on undertaking not to prosecute.

S. had some of his buffaloes stolen. *H.* proposed to *S.* that if *S.* would pay him Rs. 200 and promised to take no steps to prosecute the thieves he would procure the restoration of the stolen cattle. *S.*, however, would not agree to this proposal and reported the matter to the police.

Held that *H.* was not guilty of an attempt to commit the offence specified in section 215 of the Indian Penal Code. *Queen Empress* v. *Chittar* (4), not followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Girdhari Lal Agarwala* and Munshi *Lachmi Chandar*, for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

RAFIQ, J.:—This is a revision by one Hargayan who has been convicted under section 215 of the Indian Penal Code. It appears that one Sri Gopal owned some buffaloes, five of which

* Criminal Revision No. 364 of 1922, from an order of D. C. Hunter, Sessions Judge of Bulandshahr, dated the 17th of May, 1922.

(1) (1911) I. L. R., 34 All., 166.
(2) (1890) I. L. R., 18 Calc., 10.
(3) (1921) I. L. R., 44 All., 5.
(4) (1896) I. L. R., 20 All., 389

lost property to recover it on the receipt of a certain amount on the condition that the thieves should not be prosecuted. With due deference to the learned Judge responsible for the decision of the case of *Queen-Empress* v. *Chittar* (1), I am unable to agree with him with regard to his remarks to be found at page 301 of I. L. R., 20 Allahabad. The remarks are as follows :—

"It remains to consider whether they are guilty of an attempt to commit the offence mentioned in section 215 of the Indian Penal Code. In my opinion an attempt to take a gratification within the meaning of section 215 of the Indian Penal Code necessarily includes the idea of a concurrence of wills between the giver and taker, with this much superadded thereto that some act has been done preliminary to the act of taking. In other words, an attempt is a stage in the commission of the offence which is intermediate between the concurrence or consent and the actual taking."

I think that if an attempt to take a gratification within the meaning of section 215 of the Indian Penal Code necessarily includes the idea of a giver and taker, it is no more an attempt to commit an offence but a substantive offence, on the language of the section. In an offence like the one specified in section 215 of the Indian Penal Code, an attempt to commit it could only be under circumstances similar to those of the present case. I am, therefore, of opinion that the applicant is guilty of an attempt to commit an offence under section 215 of the Indian Penal Code. I would, therefore, allow his application so far as to set aside his conviction and sentence under the substantive offence described in section 215 and to convict him of an attempt to commit the said offence under section 215/511. I would alter his sentence to one year's rigorous imprisonment and Rs. 50 fine and, in default, to three months' rigorous imprisonment.

STUART, J. :—I concur.

BY THE COURT.—The conviction is altered to one under section 215/511 and the sentence is to be one of rigorous imprisonment for one year and a fine of Rs. 50, and, in default, three months' rigorous imprisonment.

Conviction altered.

(1) (1898) I. L. R., 20 All., 299.

APPELLATE CIVIL.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Gokul Prasad.

1922 October, 27.

GOPI DAS (DEFENDANT) v. MADHO LAL*

Criminal Procedure Code, section 145 [repealed] — Dispute concerning property—Compromise—Suit for determination of rights.

The fact that a compromise has been arrived at in proceedings under section 145 of the Criminal Procedure Code does not imply any decision as to the rights of the parties and does not prevent them from having recourse to the Civil Courts.

THE facts of this case are [illegible] of the Court.

Pandit *Hari Kishan Kaul* [illegible] for the appellant.

Dr. *Surendra Nath* [illegible] for the respondent.

BANERJI and GOKUL PRASAD, JJ. [illegible] Second Appeal No. 1425 of 1921 [illegible] the suburbs of Benares. In execution [illegible] against one Parsotam, this grove [illegible] 10th of February, 1911, and was [illegible] Madho Lal brought a suit for [illegible] grove by virtue of this auction purchase. A [illegible] brought by the appellant, Gopi Das, [illegible] possession of the grove, at least [illegible] appears that some disputes arose between Parsotam and Gopi Das before the auction sale, and [illegible] Criminal Court under section 145 of the Criminal Procedure Code. That case was compromised on the 5th of May, 1918, and in that compromise it was agreed that Gopi Das was to remain in possession of [illegible] Das was to remain in possession of [illegible] minal Court decided the case under section 145 of the Criminal Procedure in accordance with the terms of the compromise, and declared that possession should be with the respective parties in the manner mentioned in the document until the question of title was settled in due course of law. After the auction sale of Parsotam's rights, disputes arose between Madho Lal and Gopi Das and two cases were instituted in the Criminal Court, one under section 145 of the Code of

* Second Appeal No. 1424 of 1921, from a decree of A. G. R. Pullan, District Judge of Benares, dated the 12th of August, 1921, confirming a decree of Ram Chandra Saksena, Subordinate Judge of Benares, dated the 19th of May, 1921.

Criminal Procedure and the other under section 295 of the Indian Penal Code. In the case under section 145 of the Code of Criminal Procedure, a compromise was filed on the 8th of December, 1919, and in that compromise it was agreed that possession should be maintained in the manner mentioned in the earlier compromise of 1918. After this Madho Lal brought his suit. The court of first instance found, and this finding was confirmed by the learned Judge, that the grove originally belonged to one Raja Ram, that he sold half of it to Parsotam and the other half to Ratan Singh and that Ratan Singh's half was purchased by Parsotam, so that the ownership of the grove was in Parsotam. On that finding the suit of Madho Lal was entitled to succeed because he had stepped into the shoes of Parsotam. Gopi Das claimed to be the *chela* of one Chhotu Das, and he says that the grove was waqf property and that Chhotu Das was the manager of it, and, after his death, his widow was the manager and that after her death he, as *chela* of Chhotu Das, succeeded to it. This has been found against him. It has been found that he was not the *chela* of Chhotu Das.

On these findings the courts below have decreed Madho Lal's suit and dismissed the suit of Gopi Das. Gopi Das has preferred these appeals and the question to be considered is what is the effect of the compromises referred to above. The learned Judge held that the two compromises did not operate to create any title in Gopi Das. The compromises were filed for the purposes of the cases under section 145 of the Code of Criminal Procedure, and in proceedings under that section the question was only one of possession and it was the question of possession that was settled by those compromises. So far as the question of title is concerned, the two documents, upon which reliance has been placed, cannot be treated as documents conveying title. If it had been intended that Parsotam wished to convey a part of the property to Gopi Das, he would have executed a duly stamped and registered document, but this was not done, and, even if the intention had been to convey the property, that intention was not carried out by a duly executed and registered document. The compromises, therefore, could not give the effect of conveying proprietary right to Gopi Das who, upon the findings of the court below, has no title to the property.

Gopi Das claimed adverse possession, but it has been rightly held that, since his possession began only in 1912, it was

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not for such a length of time as would confer any proprietary right on him by reason of his possession. The compromises could, at the outside, amount to an admission of title but they could not be deemed to have the effect of estoppel. Therefore it was open to Madho Lal to prove that title to the property was in Parsotam and that he by purchasing the rights of Parsotam had acquired the property.

It was next urged that Madho Lal or Parsotam had not been in possession within 12 years preceding the date of Madho Lal's suit and that, therefore, any right which Parsotam had, had become extinct when the suit was instituted. That contention has no foundation because it has not been found that Chhotu Das was in adverse proprietary possession. The court of first instance did not hold that his possession was adverse or of proprietary character and the lower appellate court only says that, "it is possible that Chhotu Das maintained the worship of the idol of Hanumanji" which exists on the land in question. The learned Judge did not find that Chhotu Das was in adverse proprietary possession; therefore there is no finding on the basis of which it can be contended that Parsotam or his predecessors were deprived of possession by reason of the adverse possession of some one else.

We think that in view of the above circumstances the claim of Madho Lal has been rightly decreed and the appeals must fail. We dismiss both appeals with costs.

Appeals dismissed.

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October, 27.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Walsh.

KANHAI LAL AND OTHERS (PLAINTIFFS) v. JAI LAL AND OTHERS (DEFENDANTS).*

Act No. I of 1877 (Specific Relief Act), section 42—Suit by joint family property by some members—Suit by other members for declaration of title—Possession not actually lost.

Certain members of a joint Hindu family sold some of the family property, and the vendee, in turn, gave a lease of the property to one of the vendors, with the result that the joint family continued in actual possession. The other members of the joint family sued for a declaration that the sale was void as against them.

Held, on objection taken by the defendants based on section 42 of the Specific Relief Act, 1877, that, inasmuch as the plaintiffs had not actually lost possession of the disputed property, they were not obliged to seek more than a declaration. *Ram Manorath Singh* v. *Dilraji Kunwari* (1), followed

* Second Appeal No. 1330 of 1921, from a decree of Kshirod Gopal Banerji, District Judge of Shahjahanpur, dated the 15th of August, 1921, reversing a decree of Raghubans Dayal, Additional Munsif of Tilhar, dated the 4th of February, 1921.

(1) (1913) I. L. R., 36 All., 126.

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KANHAI LAL v. JAI LAL.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. M. L. Agarwala, for the appellants.

Dr. S. M. Sulaiman, for the respondents.

BANERJI and GOKUL PRASAD, JJ.:—This appeal arises out of a suit brought by the plaintiffs appellants for a declaration that a certain sale deed of a shop, executed by five members of a joint family, was null and void as against the plaintiffs who were also members of that family. The plaintiffs are all minors, except the plaintiff No. 1, who has just attained majority. The sale took place on the 1st of October, 1915, and the suit was brought on the 27th of November, 1920. One of the pleas taken in defence was that the suit was barred by the provisions of section 42 of the Specific Relief Act. The first court held that the plaintiffs were and had been in possession of the property and, therefore, no further relief could be asked for and section 42 of the Specific Relief Act had no application. On appeal, the learned District Judge has come to the conclusion that because of a lease (*ikrardad*) executed by one of the vendors, on the 30th of September, 1919, in favour of the vendee defendant No. 1, the vendee was in constructive possession of the property and the suit was, therefore, barred by section 42 of the Specific Relief Act, and has dismissed the suit. The learned Judge refers to a decree passed by him in a suit by the vendee against Ajudhia Prasad the lessee, and says:—"This would show that on the date of decree in the suit which has given rise to this appeal, the defendant No. 1 was in constructive possession of the shop. Ajudhia Prasad was occupying it only as his tenant. The lower court relied upon the evidence of the witnesses who said that all the plaintiffs used to sit in the shop. But this was natural, considering that the plaintiffs and their father and uncles (defendants 2 to 6) were all joint and all carried on the business in the shop. This fact alone would not show that the plaintiffs alone used to sit in the shop." And then the learned Judge goes on to say:—"On these facts I must hold that the appellant (defendant No. 1) is in possession of the shop and, as such, the plaintiffs' suit for a mere declaration was not tenable and is barred by section 42 of the Specific Relief Act." In taking this view, we think the learned Judge was in error. There was no further relief which the plaintiffs could have asked for. They were in actual physical possession of the shop, and constructive

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possession, if any, of the defendant would not affect the matter. This was not a case in which the plaintiffs could be regarded as being out of possession. The physical possession of the plaintiffs was admitted and the question was as to the nature of that possession. We asked the learned vakil for the respondents to explain to us the nature of the further relief which the plaintiffs could have asked for and he could not say that it would be a relief for possession. This case is similar to that of *Ram Manorath Singh* v. *Dilraj Kuar* (1). In our opinion, in view of the facts of this case, section 42 of the Specific Relief Act has no application. We therefore, allow the appeal, set aside the decree of the lower appellate court and remand the case to that court with directions to restore it to its original number and to dispose of the remaining pleas according to law. Costs here and hitherto will be costs in the cause.

Appeal allowed.

APPELLATE CRIMINAL.

Before Mr. Justice Stuart and Mr. Justice Ryves.

1922 November, 1.

EMPEROR v. DEO DAT.*

Criminal Procedure Code, section 533—Confession—Admissibility of confession recorded in English.

The confession of an accused charged with murder was recorded by a Magistrate in the following circumstances. The accused's fetters were removed and all policemen were sent out of the Magistrate's room. The Magistrate then, having satisfied himself that the accused had not been tutored, proceeded to record his confession in English in a narrative form. He then translated what he had written to the accused who admitted it to be correct and affixed his thumb impression.

Held that the confession was admissible, any defects in the manner of recording it being cured by section 533 of the Code of Criminal Procedure. *Queen-Empress* v. *Bachanna* (2) and *Queen-Empress* v. *Jura* (3), followed. *Queen-Empress* v. *Raghu* (4), referred to.

THE facts of this case are fully set forth in the judgment of the Court.

Pandit *Mohan Lal Sandal*, for the appellant.

The Government Advocate (Babu *Lalit Mohan Banerji*) for the Crown.

* Criminal Appeal No. 787 of 1922, from an order of Gauri Shankar Tewari, Additional Sessions Judge of Allahabad at Mirzapur, dated the 3rd of October, 1922.

(1) (1913) I. L. R., 36 All., 120.
(2) Weekly Notes, 1891, p. 55.
(3) Weekly Notes, 1892, 60.
(4) (1898) I. L. R., 23 Bom., 221.

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EMPEROR v. DEO DAT.

STUART and REVES, JJ. :—Deo Dat Koeri, aged 46, has been convicted of the murder of a Kahariu woman, named Musammat Gauri, and sentenced to death. He has appealed. The record is also before us for confirmation of the death sentence passed on him.

It appears that Musammat Gauri lived in Chunar, first of all with Sheobaran, after his death with Chhedi, and after Chhedi's death she continued to live in the shop which had been occupied by Chhedi, with the accused Deo Dat, and they together carried on a dairy business. The woman seems to have been of loose character and, recently, she had formed an intimacy with a young man named Gajadhar. The accused undoubtedly became jealous of this, and there were frequent quarrels between her and the accused on the subject. This is borne out by the evidence of neighbours put forward by the prosecution and whose evidence does not seem to admit of any doubt. The accused himself admits that he had no enmity with any one of them. The woman was last seen alive up to 8 or 9 p.m. on the night of the 20th of July; at that time the accused was in the shop occupied by the woman. The next morning the shop was found closed; on the third day, in consequence of an offensive smell attracting the notice of the Police, the shop was opened and the dead body of Musammat Gauri was found lying on her cot. It was evident from the wounds that she had been killed instantaneously, as she slept, by two blows on the neck caused probably by an axe. The axe was found lying near the bed. A pair of shoes and an umbrella, which subsequently were identified as having belonged to the accused, were also found inside the shop. Suspicion at once fell upon the accused, who was not found at Chunar, but was arrested, on the 24th July, in Benares. On the 25th he was placed before a Magistrate of the second class, and made a statement which was recorded by the Magistrate. In that statement he admitted that he had killed Musammat Gauri because she had within the last four months fallen in love with Gajadhar and quarrelled with him and had refused to give him food for three days. He said that he struck her twice on the neck with an axe and she died instantaneously; that he then ran off to Benares and was arrested at Rajghat. Apart from this statement, the only other evidence against the accused is circumstantial; but, in our opinion, it leaves no sort of doubt as to the guilt of the accused. It has been argued that this statement, recorded by

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the Magistrate, is inadmissible in law because it was taken down in English and in a narrative form. In our opinion section 533 of the Criminal Procedure Code completely cures any formal defects which might have been made in the recording of the confession. The Magistrate himself was called and he swore that he had all police removed from the court-room and also had the handcuffs removed from the accused's hands; he asked the accused whether he was tutored by anybody and, after being satisfied that the accused was not tutored by anybody, he recorded his confession. He admitted having recorded the confession in English, but says that he translated it to the accused who admitted the statement to be correct and fixed his thumb mark thereto. It is true that the Calcutta High Court, in *Jai Narayan Rai* v. *The Queen-Empress* (1), has held that under such circumstances a confession is inadmissible, but this ruling has been dissented from by the Bombay High Court in *Queen-Empress* v. *Raghu* (2), and twice in our own Court in *Queen-Empress* v. *Bachaina* (3) and *Queen-Empress* v. *Anta* (4) by a Division Bench. There the facts were almost exactly the same as here and a Bench of this Court has held that under such circumstances section 533 completely cures any such irregularities or informalities in the recording of a confession. The accused, when he was examined before the Magistrate on the 22nd of August, stated that he had never been in Chunar in his life and that he did not even know Musammat Gauri. He denied that the shoes and umbrella were his and could suggest no reason at all why the charge has been brought against him. He stated that he had made no statement before any Magistrate in Benares. He repeated this statement throughout the case, until we come to his examination on the 26th of September before the learned Sessions Judge. He there admitted, although he denied having made any statement before the Deputy Magistrate in Benares or that the shoes belonged to him, that he did know Musammat Gauri and that he lived at her house. He said that he had a quarrel with Musammat Gauri at 10.30 p.m. when Gajadhar, with whom she had criminal intimacy, came up and told him to go away from the shop and said that if he did not go away, he would kill him. He said he then went away to Benares by the

(1) (1900) I. L. R., 17 Calc., 562.
(2) (1898) I. L. R., 23 Bom., 221.
(3) Weekly Notes, 1891, p. 55.
(4) Weekly Notes, 1892, p. 60.

12 p.m. train leaving all his things in the house of Musammat Gauri. The suggestion, of course, is that the woman was killed, after he had left the shop, by Gajadhar. In his memorandum of appeal, for the first time, he sets up a definite *alibi*. He said that he was in Benares when the woman was killed and that he had been in Benares for six years and had nothing whatever to do with the woman. Even if we leave out the confession altogether, we think the circumstantial evidence coupled with the contradictory statements of the accused in themselves leave no room for doubt that he murdered Musammat Gauri in a fit of jealousy. The fact that all her ornaments were found on her person shows that theft was not the object of the murder. Both the assessors would acquit on the ground that there was no eye-witness. In our opinion, there is no room for reasonable doubt in this case. The murder was a deliberate and cruel murder of a defenceless woman in her sleep. We, therefore, see no reason to interfere with either the conviction or the sentence. We dismiss the appeal, confirm the conviction and sentence and direct that the latter be carried out according to law.

Appeal dismissed.

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APPELLATE CIVIL.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

1922 November, 1.

DIPT NARAIN SINGH (DEFENDANT) v. RANDHIR SINGH (PLAINTIFF).*

Act No. IX of 1908 (Indian Limitation Act), schedule I, articles 91, 118 and 120—Suit to declare adoption void—Limitation Act No. I of 1877 (Specific Relief Act), section 42—Estoppel.

On the 22nd of February, 1892, *B.*, who was indebted to *R.* to the extent of Rs. 5,500, executed in favour of *C.*, a relation of *B.*, a mortgage of his property in village *K.* for the sum of Rs. 7,000, of which Rs. 5,700 were to be paid in satisfaction of *R.'s* claim.

On the 25th of September, 1902, *B.* executed a document in which he declared that he had adopted *B.*, one of the two sons of *B.*, and conveyed to him his property in village *K.* Mutation of names was effected in favour of *B.*, but *R.* remained in possession as *C.'s* mortgagee during his re-nidity.

On the 5th of July, 1905, in consequence of proceedings [illegible] Government under the Bundelkhand Encumbered Estates Act, a compromise was entered into as between *B.*, *B.* and *C.*, whereby *B.* undertook responsible for *C.'s* claim under his mortgage, and *R.* to confirm the [illegible] of *B.* It was further agreed that if *R.* repudiated the [illegible] be bound to pay to *B.* Rs. 11,250, the estimated val[illegible]

In 1907 *B.* died and was succeeded by [illegible] exclusion of *B.*

In 1917 *B.*, having attained [illegible] from the revenue records in respect of the property [illegible]

* First Appeal No. 32 of 1920, [illegible] dinate Judge of Jhansi, dated the 31st of [illegible]

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On the 17th of May, 1918, *R.* filed a suit in which he denied the adoption of *U. in toto* and asked for the following declarations:—(1) that the deed of the 26th of September, 1902, was void and of no effect as against the plaintiff, (2) that *U.* was not the plaintiff's adopted son, and (3) that he had no rights in the village *K.*

Held that the suit was barred by limitation both under article 91 and article 118 of the first schedule to the Indian Limitation Act, 1908, as well by section 42 of the Specific Relief Act, 1877. It was also barred under article 120 of the Indian Limitation Act, if that article could be considered applicable.

THE facts of this case are fully set forth in the judgment of the Court.

Dr. *S. M. Sulaiman* and Mr. *N. C. Vaish*, for the appellant.

Dr. Surendra Nath Sen, for the respondent.

MUHAMMAD RAFIQ and PIGGOTT, JJ.: The plaintiff in this case, Diwan Randhir Singh, is a landed proprietor, residing in the Jhansi district. Amongst his property we find certain land in a village called Kerokhar, held by him, in what is described in this record, as an *ubari* tenure. We should have preferred to find on the record a little more evidence regarding the precise nature of this tenure and the conditions to which it is subject. It would seem, however, that the tenure is something of the nature of a special grant from Government and that it is subject to resumption by Government under possible conditions, though what those conditions may be, is not made particularly clear. As long ago as the 9th of March, 1901, Diwan Randhir Singh borrowed a sum of Rs. 5,500 from a caste-fellow of his own, Diwan Balbhadar Singh residing in the Hamirpur district. One of the few points on which the plaintiff has not, in the course of this litigation, contradicted previous admissions of his own, is the fact that he really did borrow Rs. 5,500 in connection with the execution of this document. Even in the trial court he admitted in plain terms that he did owe Diwan Balbhadar Singh this sum of money. Evidently the original intention of the parties was that this money should be secured by usufructuary mortgage on the property of Diwan Randhir Singh in the village of Kerokhar. Whether possession was actually given to the mortgagee is not quite clear; but it seems to be an admitted fact that, after the execution of this document, the parties began to doubt whether an alienation of this land in this particular form would be permitted by Government, and the question arose between the borrower and the lender about substituting some other form of security. At any rate, on

the 22nd of February, 1902, we find Diwan Randhir Singh executing a simple mortgage of the same property in favour of one Kunwar Chimman Singh, for a consideration stated at Rs. 7,000, out of which Rs. 5,500 was to go to pay the debt due to Diwan Balbhadar Singh. In the present suit the plaintiff described Kunwar Chimman Singh as the own nephew of Diwan Balbhadar Singh. When cross-examined on the point, he failed to make out this precise relationship; but we may take it that there was some relationship between the two men. The plaintiff has alleged that no further consideration passed in respect of this document for Rs. 7,000 and that its execution was part of an arrangement between himself, Balbhadar Singh, and Kunwar Chimman Singh for the transfer of the debt due to Balbhadar Singh and its conversion into a simple mortgage for Rs. 7,000 in favour of Kunwar Chimman Singh, because the creditor was not satisfied with the security offered by the usufructuary mortgage originally executed.

The next important date in the case is the 25th of September, 1902. On this date Randhir Singh admittedly executed a document the interpretation and effect of which are questions in dispute between the parties. On the face of it this document consists of an express declaration that the executant had shortly before taken in adoption, with all due formalities, Kunwar Udit Narain Singh, minor son of Balbhadar Singh, and, further, that, as part of the same arrangement, the executant conveyed to the said Kunwar Udit Narain Singh his own proprietary rights in this village of Kerokhar. From the date of the execution of the deed, Kunwar Udit Narain Singh was to be the owner of this *ubari* tenure.

So long as he remained a minor, however, the property was to remain under the management and superintendence of Randhir Singh. There were other provisions dealing with the possibility of the subsequent birth of natural offspring to the executant, but with this we are not directly concerned. Mutation proceedings followed before the revenue courts and, in the course of those proceedings, it is beyond question that Randhir Singh stated in the most express and definite language that his possession over this property in village Kerokhar was now that of a guardian and superintendent (we might say, a trustee) on behalf of Kunwar Udit Narain Singh. After this date the proceedings taken by the Local Government under the Bundelkhand Encumbered Estates Act of

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1901 came into operation. Diwan Randhir Singh was one of the indebted proprietors, whose estate was brought under the operation of that Act and we have it that a number of claims were filed against him. Amongst other creditors Kunwar Chinman Singh put in a claim on foot of his simple mortgage for Rs. 7,000. In the court of the Special Judge appointed to determine claims under the Encumbered Estates Act a compromise was eventually filed, bearing date the 5th of July, 1905. The wording of this document is certainly peculiar. It makes no secret of the fact that Diwan Randhir Singh had entertained the intention of denying and repudiating the adoption of Kunwar Udit Narain Singh attested by the registered deed of the 25th of September, 1902. However, the compromise sets forth that, after discussion between the parties concerned, Diwan Balbhadar Singh had taken it upon himself to satisfy whatever claim Kunwar Chinman Singh had under the mortgage of 1902 and that, in return for this consideration, Diwan Randhir Singh had abandoned whatever intention he might have entertained of repudiating the adoption. He now binds himself, in express terms, to consider Kunwar Udit Narain Singh as his son and he reaffirms the fact of the adoption. There are certain other conditions, the most notable of which is that, in the event of this adoption ever being repudiated by Diwan Randhir Singh or any other member of his family, they shall be bound to pay to Diwan Balbhadar Singh a sum of Rs. 11,250, which is estimated as the amount of the debt due to Kunwar Chinman Singh upon his simple mortgage in respect of which Diwan Randhir Singh was obtaining a release under the terms of the compromise.

We now come to the year 1907, in the course of which Diwan Balbhadar Singh died. He had another son named Raj Ballabh Singh, and, on his death, the question arose regarding the succession to his proprietary rights. This was brought before the revenue courts upon an application for mutation. The order of the Assistant Collector, dated the 10th of September, 1907, is on our file. It is to the effect that Kunwar Udit Narain Singh having been adopted into another family, had no right of succession in respect of the estate of his natural father. The order passed, therefore, is that Raj Ballabh Singh alone be recorded as having succeeded to the proprietary rights of Diwan Balbhadar Singh. About the end of the year 1916, or the beginning of the year 1917,

Kunwar Udit Narain Singh attained majority. On the 5th of January, 1917, he presented a petition to the revenue courts calling attention to the fact that he had now attained majority and asking that in the records for the village of Kerokhar this fact should be recognized by the removal of the name of Diwan Randhir Singh, which, up to that time, stood recorded as superintendent or manager (*Sarbarahkar*) in charge of the property on behalf of the minor proprietor, Kunwar Udit Narain Singh. This application was granted.

On the 16th of May, 1918, Diwan Randhir Singh filed the suit with which we are now concerned. He bases this suit essentially upon the allegation that he had never adopted Kunwar Udit Narain Singh and had never even purported to perform any ceremony of adoption in respect of this boy. He recites certain facts, intended to account for the execution of the deed of the 25th of September, 1902, and his own subsequent proceedings. It is sufficient to say that he represented to the court that he was under pressure from Diwan Balbhadar Singh, on account of the debt which he owed to that gentleman, and that the aforesaid creditor, while putting pressure upon him to satisfy the debt, offered to refrain from pressing his claim if the debtor, *i.e.*, Diwan Randhir Singh, would execute a document declaring (falsely) that he had adopted Kunwar Udit Narain Singh and purporting to convey to this minor boy his proprietary rights in the village of Kerokhar. To do the plaintiff all possible justice, we may make it clear that the plaint insists upon the fact that the statements in the deed of the 25th of September, 1902, regarding the adoption were known to be false at the time by all parties concerned and that it was a perfectly well understood thing that the transfer of the *uhari* tenure in village Kerokhar in favour of Kunwar Udit Narain Singh was to remain a mere paper transaction. As a matter of fact, according to the plaint, Diwan Randhir Singh had remained right up to the year 1917 in the position of beneficial owner in respect of this property. He had applied the rents and profits of the same to his own use, neither spending anything on account of the nominal owner, Kunwar Udit Narain Singh, nor feeling himself under any obligation to render, or even to keep, any account of his receipts or of his expenditure. Further, it is represented in the plaint that, in spite of the proceedings of the year 1905 and the compromise then executed, no real cloud had ever been cast on the plaintiff's title to

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this property until Kunwar Udit Narain Singh made his application of the 5th of January, 1917. This is the date given in the plaint for the origin of the cause of action, and there are four reliefs sought. The first is a declaration that the deed of the 25th of September, 1902, is void and ineffectual as against the plaintiff. The second is that it may be declared that the defendant Kunwar Udit Narain Singh is not the adopted son of the plaintiff, Diwan Randhir Singh. The third is that it may be declared that the aforesaid defendant has no rights in the village of Kerokhar, but that the plaintiff is the owner of the property therein already referred to. The last is in the form of an alternative relief and asks for a declaration that, in any event, if Kunwar Udit Narain Singh be the adopted son of Diwan Randhir Singh, these two are, as members of a joint undivided Hindu family, owners in equal shares of the *ubari* property in the village of Kerokhar.

In reply to this claim, apart from a denial of the facts put forward by the plaintiff and an assertion that the adoption of the defendant had fully and effectively been carried out prior to the execution of the deed of the 25th of September, 1902, a number of legal objections were raised. It was contended that the suit as brought was clearly barred under any possible article of the schedule to the Indian Limitation Act which could be suggested as applicable to the same. There was also a contention that, as regards the declaration of title sought in respect of the *ubari* tenure in village Kerokhar, the plaintiff was not entitled to claim a mere declaration, inasmuch as he had been effectively dispossessed in consequence of the defendant's application of the 5th of January, 1917, and the orders of the revenue courts passed thereon.

The trial court elected to take evidence on all the issues before determining any of the questions of law. We may say at once that with regard to the alleged adoption, there was a considerable body of evidence produced on both sides. The witnesses for the plaintiff were in direct conflict with those for the defendant and there was undoubtedly some hard swearing on one side or the other. The trial court came to the conclusion that Diwan Randhir Singh was speaking the truth when he said that he had never adopted Kunwar Udit Narain Singh and had never even gone through any ceremony purporting to have the effect of an adoption. For reasons to be stated presently, we do not propose to record a definite finding on this point. We feel bound to say, however,

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that the learned Subordinate Judge seems to us to have given very indifferent reasons for not attaching greater weight than he has done to the repeated declaration of Diwan Randhir Singh; nor has he attempted to consider the question of the probability or improbability of the conduct attributed to Diwan Balbhadar Singh in the plaintiff's version of the facts. It being admitted that a substantial sum of money, amounting at least to Rs. 5,500 was due from the plaintiff to Diwan Balbhadar Singh, the court was bound to ask itself what consideration Diwan Balbhadar Singh received for refraining from pressing his claim (under cover of the mortgage executed in favour of Kunwar Chimman Singh in the year 1902) and for abandoning it altogether in the year 1905. No doubt the actual adoption of Diwan Balbhadar Singh's younger son by Diwan Randhir Singh and the actual transfer to the boy of the property in village Kerokhar would form an effective consideration for the abandonment of a claim on the mortgage; but what the plaintiff says is that no such consideration ever passed and that Diwan Balbhadar Singh knew perfectly well throughout that there had been in fact no adoption and that the recital in the deed of the 25th of September, 1902, of the transfer in favour of the minor boy was a mere paper transaction which would never be carried into practical effect.

We are, however, principally concerned with the legal objections raised by the defendant; the first and most important question is that of limitation. It also requires to be considered in the same connection whether, in any event, the conduct of the plaintiff towards Diwan Balbhadar Singh and towards Kunwar Udit Narain Singh has not been such as to create an estoppel in law, preventing the court from entertaining any plea on the plaintiff's part based upon the assertion that no adoption in fact took place. No doubt it is perfectly true that under the Hindu law an adoption can only be effected by the due performance of certain religious ceremonies; but we have the authority of their Lordships of the Privy Council in a well known case from these Provinces for the proposition that the plaintiff in an action can be estopped by his own previous conduct from asserting that such valid and binding adoption had not in fact taken place.

Now, with regard to the question of limitation, the claim for a declaration of the invalidity of the deed of the 25th of September, 1902, fell, *prima facie*, under article 91 of the first schedule to the Indian Limitation Act (No. IX of 1908),

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The essential fact which, according to the plaint, entitled the plaintiff to have the instrument cancelled or set aside is beyond question the fact that no adoption had ever taken place prior to the execution of this document. This fact was perfectly well-known to the plaintiff, if there is any truth whatever in his story, on the very date on which he put his signature to this document and caused it to be registered. *Prima facie*, therefore, the law allowed him a period of three years within which to change his mind and contest the validity of the document, if he desired to do so. A still more important article to be considered is article 118 of the same schedule. This article governs any suit to obtain a declaration, not merely that an alleged adoption is invalid, but also that it never in fact took place. The period of limitation is six years from the date on which the alleged adoption became known to the plaintiff. We need hardly lay stress upon the fact that the courts are bound strictly to enforce the provisions of the Indian Limitation Act; but if ever there was a case for the strict enforcement of that statute, the one now before us seems to fulfil every possible condition. Here we have a plaintiff who has asserted over and over again the fact:um of a certain adoption, who has consented to be bound by it, who has on his own showing received valuable consideration in return for making such assertions and who has by reason of the setting up of the alleged adoption, caused the defendant to be deprived (under the orders of the revenue court as they stand at present) of all share in the landed property of his own natural father. Almost sixteen years after the date on which the alleged adoption was proclaimed by the plaintiff himself in the deed of the 25th of September, 1902, he comes into court with a suit which can succeed, if at all, only upon the basis of a finding that the alleged adoption never in fact took place. In our opinion the suit as a whole, in the form in which it has been brought, is statute-barred for this reason alone, under the provisions of the article above referred to. The court below has come to the conclusion that a different article, namely 120 of the same schedule, applies to the suit, by reason of the 3rd and 4th reliefs in the claim, and that a cause of action for the suit bringing it within limitation under this article arose on the 5th of January, 1917. As regards this proposition of law, a good deal might be said on both sides, if we thought the provisions of article 120 of the first schedule to the Indian Limitation Act could be invoked at all

in respect of this suit. According to the most authoritative decision of this Court at present reported, namely, the case of *Akbar Khan* v. *Turaban* (1), the suit for a declaration would be barred under this article, in any case, because a cause of action for a declaration that Kunwar Udit Narain Singh was not in fact the owner of the property, which the plaintiff himself had caused to be recorded in his name in the village of Kerokhar, had accrued to the plaintiff many years before the 5th of January, 1917. It must be conceded, however, that the propositions of law involved in the decision above referred to are somewhat controverted and are not altogether reconcilable with certain other decisions of this Court, of which we may refer to the case of *Sheopher Singh* v. *Deonarain Singh* (2), as an example. Our view, however, on this part of the case, may be stated thus. In the first place, we are of opinion that the whole suit is so entirely dependent upon an adjudication of the question whether the alleged adoption did or did not in fact take place, and a suit for a declaration to that effect is so clearly time-barred, that the suit cannot be brought within limitation by invoking the provisions of an article like 120 of the schedule which, by its very terms, can only come into operation when there is no other article of the schedule that can be invoked as laying down a period of limitation for a particular suit. In the second place, we are clearly of opinion that the reliefs (*c*) and (*d*), in which the plaintiff seeks relief by way of alternative declarations relating to the proprietary rights in the village of Kerokhar, are not maintainable by reason of the provisions of section 42 of the Specific Relief Act. We cannot explain the finding of the court below that the plaintiff's possession as owner of the said proprietary rights has never been disturbed and was actually continuing up to the very date of the suit. There is, first of all, the question whether the plaintiff did or did not lose possession over his proprietary rights when he made an express declaration that he would in future manage the property in question as a trustee for the then minor defendant. In the second place, we are still more clearly of opinion that the effect of the revenue court's orders upon Kunwar Udit Narain Singh's application of the 5th of January, 1917, must inevitably have been the dispossession of the plaintiff. The learned Subordinate Judge,

(1) (1908) I. L. R., 31 All., 9.
(2) (1912) 16 A. L. J., 413.

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it seems to us, does not realize what the practical effect of a revenue court's decision in mutation is. From the date on which the name of Diwan Randhir Singh was expunged from the entry regarding the proprietary rights in this village as it previously stood, the only person who could maintain suits or proceedings in the revenue courts necessary to the collection of rents and the management of the property was Kunwar Udit Narain Singh. We cannot believe that the practical effect of these proceedings was not to leave the defendant, Kunwar Udit Narain Singh, in effective possession of the property. The whole suit, therefore, is, in our opinion, misconceived. It is not necessary for us to discuss the theoretical question of what would have been the plaintiff's position, if he had consented to recognize existing facts and to bring this suit merely as one for the recovery of possession on the basis of a still subsisting title. Undoubtedly it would then have been for the defendant to plead that the plaintiff's title had been first of all modified by the alleged adoption and finally extinguished, either by the execution of the deed of the 25th of September, 1902, or by subsequent proceedings. No doubt the defendant could and would also have pleaded that he had a superior title to the plaintiff, unless the latter were permitted to put forward allegations of fact which he was in law estopped from setting up or proving. It would have been difficult to say, however, that a suit for recovery of possession on the basis of title, alleging dispossession early in the year 1917, would have been, on the face of it, barred by limitation. The present suit, in our opinion, is so barred, principally by reason of the provisions of the Indian Limitation Act to which we have referred, also by reason of the conclusion we have come to regarding the possession of the property on the date of the institution of the suit, and, to some extent, also by the principle of estoppel. For these reasons we allow the appeal, set aside the decision of the court below, and dismiss the plaintiff's suit with costs throughout.

Appeal allowed.

PRIVY COUNCIL.

HARNATH KUNWAR (PLAINTIFF) v. INDAR BAHADUR SINGH (DEFENDANT).

* P. C. 1922 Nov., 28.

(On appeal from the Court of the Judicial Commissioner of Oudh.)

Indian Contract Act (IX of 1872), section 65—Agreement discovered to be void—Recovery of consideration—Unenforceable agreement—Sale of expectancy—Oudh taluqdari estate—Decree declaring vendee heir—Act No. I of 1869 (Oudh Estates Act)—Limitation.

A Hindu, while next reversioner to an Oudh estate (in list II under Act I of 1869), obtained a decree declaring that a will, which the widows of the last holder alleged authorized them to adopt, was invalid, and that he was entitled to the estate upon the death of the last surviving widow. Prior to that event occurring he purported to sell half the estate in consideration of Rs. 25,000 paid over to him, declaring by the sale-deed that when he succeeded he would put the vendee in proprietary possession. After the death of the last surviving widow, the widow of the purchaser sued the vendor for possession, or alternatively to recover the purchase money with interest.

Held that there was no effectual transfer of the villages, since the vendor had only an expectancy, and the decree did not create any greater interest in him; but that under section 65 of the Indian Contract Act, 1872, the purchase money was recoverable, with interest from the date of the suit, the period of limitation not running, until the rights of the purchaser were discovered to be unenforceable.

Judgment of the Court of the Judicial Commissioner varied.

APPEAL (No. 98 of 1921) from a judgment and decree of the Court of the Judicial Commissioner (March 20, 1918) affirming a judgment of the Subordinate Judge of Bara Banki.

The appellant instituted a suit to recover from the respondent, with mesne profits, one-half of an Oudh taluqdari estate, under a deed of sale dated January 2, 1880, by which the respondent purported to sell the villages to the appellant's deceased husband; alternatively, the appellant claimed by her plaint to recover the purchase money, Rs. 25,000, with interest.

The circumstances in which the deed of sale was entered into will appear from the judgment of the Judicial Committee.

The deed stated that the executant, the present respondent, had borrowed a further Rs. 5,000 from Bachpal Singh, making Rs. 25,000 in all, and that "in lieu of that entire amount" the executant did thereby absolutely sell half of all the villages, detailed below, in the taluqa; it proceeded as follows:—"Therefore I do hereby declare and put in writing, that after the death of the said ladies" (i.e. the widows of the last holder) "or whenever I may get possession over the said taluqa I shall put the vendee immediately in proprietary

* Present: Lord BUCKMASTER, Sir JOHN EDGE, Sir LAWRENCE JENKINS, and Lord SALVESEN.

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possession of half the villages of the said taluqa as vendee thereof. I shall also get the name of the said vendee recorded in the decree relating to the said taluqa, passed in my favour by the Civil Court on October 22, 1878, to the extent of a moiety of the entire taluqa; and in case I delay the same, the said vendee will be at liberty, on the basis of this deed, to move the court and take proprietary possession as purchaser of the said villages and to get the mutation of names effected by a competent court in his favour."

The Subordinate Judge held that the respondent at the date of the deed had merely a right of expectancy in the estate, and that no property passed under it. He held that the suit to recover the money was barred by the Indian Limitation Act, 1908, schedule I, article 62; in his opinion the limitation period ran from the date of the payment of the purchase money. He accordingly dismissed the suit.

An appeal to the Court of the Judicial Commissioner was dismissed. The learned Judicial Commissioners rejected a contention that having regard to the Oudh Estates Act, 1869, the respondent had a vested interest in the estate at the date of the sale-deed; they agreed with the trial judge that he had only an expectancy of inheriting. They pointed out that the Transfer of Property Act, 1882, section 6, did not apply, as the deed was executed in 1880, but that it had frequently been decided apart from that section that a reversionary heir under the Hindu law cannot sell or mortgage his expectancy. If there was any agreement it was void under section 23 of the Indian Contract Act, 1872; consequently the principles of equity could not be invoked to give effect to it. They were of opinion that the money claim was barred by limitation, the period running from the execution of the deed at latest.

1922, October 26, 27.—*Sir George Lowndes, K. C.* and *Dube* for the appellant. At the date of the sale the respondent had more than a mere expectancy. The succession was governed by Act I of 1869, not by the ordinary law. By the decree made in 1878 he had been declared "heir," and under that decree he had a vested interest. When that decree was made it had not been decided that succession under Act I of 1869 opens on the death of the widow; see Sykes' Compendium, p. 273. It was a reasonable view to take in 1878 that, having regard to the definition of "heir" in section 2 of the Act, and to section 22, sub-sections 6, 7, a widow took a life

estate while the estate vested in the heir. If the respondent had a vested interest in 1880, the observations in *Sham Sundar Lal* v. *Achhan Kunwar* (1) that an expectancy cannot be bound under Hindu law, is not relevant. Reference was also made to *Brahmadeo Narayan* v. *Harjan Singh* (2). But even if the sale was ineffectual, there was a valid agreement. Upon the respondent obtaining possession he was bound to carry out his contract, under the principle of feeding the grant by estoppel. In *Tilakdhari Lal* v. *Khedan Lal* (3) the Board left open the question whether that principle applies in India; it is however embodied in the Transfer of Property Act, 1882, section 46, and the Specific Relief Act, 1877, section 18, and its full application as a principle of law in India cannot be excluded. The Transfer of Property Act does not prohibit an agreement to sell a reversionary right, it merely precludes a transfer. The sale was of property to which the vendor had an "imperfect title"; and he was bound therefore under section 18 of the Specific Relief Act, 1877, to make good the interest sold. In any event the appellant is entitled to recover the money advanced under section 65 of the Indian Contract Act, on the basis that the agreement was "discovered to be void": *Bassu Kuar* v. *Dhum Singh* (4). As in that case, the suit is governed as to limitation by article 97 of schedule I of the Limitation Act; the period runs from not earlier than the commencement of this suit.

De Gruyther, K. C., Parikh, and *S. C. Chaudhri* for the respondent. Apart from section 6 of the Transfer of Property Act, a sale of a reversionary right is ineffectual in Hindu law: *Sham Sundar Lal* v. *Achhan Kunwar* (5), *Sumsuddin* v. *Abdul Husain* (6). The decree of 1878 could not give the appellant's husband greater rights than he possessed apart from it. There was no erroneous representation as to the vendor's interest such as would give rise to rights under section 43 of the Transfer of Property Act, 1882; nor was it a case of a vendor having only an imperfect title so as to render section 18 of the Specific Relief Act, 1877, applicable. The appellant has no rights under section 65 of the Indian Contract Act, 1872. That section does not relate to

(1) (1898) I. L. R., 21 All., 71, 80; L. R., 25 I. A., 183, 189.
(2) (1898) I. L. R., 26 Calc., 778.
(3) (1920) I. L. R., 48 Calc., 1, 20; L. R., 47 I. A., 239, 254.
(4) (1889) I. L. R., 11 All., 47; L. R., 16 I. A., 211.
(5) (1898) I. L. R., 21 All., 71; L. R., 25 I. A., 183
(6) (1906) I. L. R., 31 Bom., 165.

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an agreement which was void in law, as this was, when it was made. It relates to one which is found to be unenforceable owing to the discovery of some fact; for instance under section 20, by it being discovered that there was a common mistake of fact. In any case article 62 of the Limitation Act applies, and time ran from the payment of the money: *Hanuman Kamat* v. *Hanuman Mandur* (1).

Sir George Lowndes, K. C., in reply. Section 65 of the Indian Contract Act, 1872, applies to an agreement which was void when made but which the parties did not know to be void: *Gulabchand* v. *Fulbai* (2), *Jijibhai* v. *Nagji* (3). The section is not in terms confined to a discovery of fact. The judgment of the Board in *Bassu Kuar* v. *Dhum Singh* (4) is conclusive that in this case article 97 applies, and time runs only from the discovery that the agreement was void.

November, 28.—The judgment of their Lordships was delivered by Sir LAWRENCE JENKINS:—

This is an appeal from a decree dated March 20, 1918, of the Court of the Judicial Commissioner of Oudh, which affirmed a decree dated August 3, 1915, of the Subordinate Judge of Bara Banki.

The suit is for the possession of the villages specified in the plaint with an alternative prayer for the payment of money. Both the lower courts have decided adversely to the plaintiff on each of these claims, and the suit has been dismissed with costs. From this decision the present appeal has been preferred.

The plaintiff's claim to the villages rests on an instrument which purports to have been a transfer on sale executed on January 2, 1880, by the defendant, Indar Bahadur Singh, in favour of Raghpal Singh, the plaintiff's deceased husband.

The villages were part of two talukas in Oudh, known as Paska and Lilar, and owned by Thakur Naipal Singh, whose name was entered in list II attached to the Oudh Estates Act I of 1869, as estates which according to the custom of the family, ordinarily devolved upon a single heir.

Thakur Naipal Singh died childless on October 28, 1873, leaving him surviving his two widows, Thakurain Ikbal Kuar and Thakurain Choti. According to Hindu law, the defendant Indar Singh was the next reversioner. The widows

(1) (1891) I. L. R., 19 Calc., 123, 126; L. R., 18 I. A., 158, 161.
(2) (1909) I. L. R., 33 Bom., 411, 416.
(3) (1909) 11 Bom. L. R., 693, 697.
(4) (1888) I. L. R., 11 All., 47; L. R., 15 I. A., 211, 219.

set up a will as that of their deceased husband, and claimed that it empowered them to adopt. Indar Singh thereupon instituted a suit against them and the Court of Wards, who had taken over the estates, and, by the decree of the Deputy Commissioner of Bara Banki dated October 22, 1878, the alleged will was declared void and invalid, and Indar Singh was declared "entitled to succeed to Paska and Lilar estates on the death of the last surviving widow of the late Naipal Singh."

It is the plaintiff's case that in 1878 her husband, Rachpal Singh, advanced Rs. 20,000 for this litigation and other expenses to Indar Singh, who was a poor man, and that in 1880, on a further advance of Rs. 5,000, Indar Singh executed the instrument of transfer on which this suit is brought.

Both courts have held that the transfer was inoperative, as Indar Singh at its date had no interest capable of transfer but merely an expectancy.

It cannot be disputed that, according to the ordinary Hindu law, this is the true view, but the plaintiff, to escape from this predicament, contends that the rights of Indar Singh must be determined by reference to the provisions of the Oudh Estates Act and the declaration contained in the Deputy Commissioner's decree.

Whatever the view that may once have prevailed, it is now established that under the Oudh Estates Act the succession to collaterals opens on the death of the widow just as under the ordinary Hindu law, and it necessarily follows that in January, 1880, Indar Singh had no more than an expectancy, and so had no interest in the villages which he was competent to transfer or bind.

Nor, in their Lordships' opinion, was this position modified by the Deputy Commissioner's decree. As the suit was constituted, the Deputy Commissioner could only have made a declaration binding on the widows and the Court of Wards, and it certainly was not within his competence to make a valid declaration that would create in Indar Singh's favour an interest in the villages that did not otherwise exist. The claim for possession was, therefore, rightly rejected.

And so it becomes necessary to consider the claim for payment of money. The amount demanded is Rs. 1,28,033-4-8, and this is made up of Rs. 25,000 principal and Rs. 1,03,033-4-8 interest at Re. 1 per cent. per month from January 2, 1880, to May 5, 1914.

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The payment of the Rs. 25,000 is established, and the defendant's pleas that the instrument of January 2, 1880, was executed under undue influence and was extortionate have failed, but the claim for recovery of the money has been held to be barred by limitation.

Before this Board, the claim has been based on section 65 of the Contract Act. It is there provided that "when an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it or to make compensation for it to the person from whom he received it."

So framed, the plaintiff's claim to compensation rests, not on any principle or formula of English law, but on the words of this section, and it has to be seen whether the facts of this case come within its scope. The section deals with (*a*) agreements and (*b*) contracts. The distinction between them is apparent from section 2. By clause (*e*) every promise and every set of promises forming the consideration for each other is an agreement, and by clause (*h*) an agreement enforceable by law is a contract. Section 65, therefore, deals with (*a*) agreements enforceable by law and (*b*) with agreements not so enforceable. By clause (*g*) an agreement not enforceable by law is said to be void.

An agreement, therefore, discovered to be void is one discovered to be not enforceable by law, and, on the language of the section, would include an agreement that was void in that sense from its inception, as distinct from a contract that becomes void.

The agreement here was manifestly void from its inception, and it was void because its subject matter was incapable of being bound in the manner stipulated.

Though this aspect of the case has not been satisfactorily presented or developed in the pleadings and the proceedings before the lower courts, their Lordships think there are materials on the record from which it may be fairly inferred in the peculiar circumstances of this case that there was a misapprehension as to the private rights of Indar Singh in the villages which he purported to sell by the instrument of January 2, 1880, and that the true nature of those rights was not discovered by the plaintiff or Rachpal Singh earlier than the time at which his demand for possession was resisted, and that was well within the period of limitation.

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It was thus that the agreement was discovered to be void, and the discovery, in their Lordships' view, was one within the words and the meaning of section 65 of the Contract Act.

The plaintiff, therefore, though not entitled to recover possession of the villages, is entitled to recover compensation, and in assessing that compensation their Lordships consider it should include the sum of Rs. 25,000 found by both courts to have been paid to Indar Singh, and also, in the circumstances of this case, interest, not at the rate or for the period claimed by the plaintiff, but at 6 per cent. from the date of the institution of this suit. Their Lordships will, therefore, humbly advise His Majesty that the decree under appeal should be varied in accordance with this opinion, and that the respondent should pay the costs of the plaintiff in both the lower courts. The costs of this appeal must be paid by the respondent.

Solicitors for appellant:—*Barrow, Rogers and Nevill.*

Solicitors for respondent:—*T. L. Wilson and Co.*

APPELLATE CIVIL.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

BANSI (DEFENDANT) v. RAM BARAN AND OTHERS (PLAINTIFFS).*

1923 *July*, 26.

*Pre-emption—Custom—Evidence—*Wajib-ul-arz.

Where two *wajib-ul-arzes* of a village, of dates 1833 and 1860, recorded that the custom of pre-emption existed in the village, it was *held* that the presumption in favour of the existence of the custom thereby afforded was not rebutted by a note appended to the *wajib-ul-arz* of 1860 to the effect that the village had been waste or desolate up to 1829.

THE facts of the case are fully stated in the following order of the lower appellate court:—

This appeal by the plaintiffs arises out of a pre-emption suit brought on custom. The one issue tried by the court below was whether the custom of pre-emption exists in the village in which the vended zamindari share lies. The decision of the court below is that the custom does not exist. The learned Munsif is of opinion that no custom of pre-emption could exist in the village in the year 1833, and that, in the interval between that year and 1860, there was one sale only, so that a custom could not grow. The point for consideration is, if the court below was right in that view. I think it was not. The *wajib-ul-arz* of the settlement of 1833 was verified by three *pattidars*, so that the village was then owned by more persons than one. Section 10 of this *wajib-ul-arz* records a custom of pre-emption, giving preference to a co-sharer over a stranger. Section 10 of the *wajib-ul-arz* of 1860 also records the custom. This *wajib-ul-arz* was verified by numerous landlords. The *mahtari* report, prepared at the settlement of 1860, has a footnote to the effect that the transfers mentioned therein were noted out of such records only as were available. It is, therefore, not exhaustive. Even

* First Appeal No. 20 of 1922, from an order of Maheshwar Prasad, Subordinate Judge of Gorakhpur, dated the 29th of November, 1921.

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as it is, it contains nothing inconsistent with the existence of a custom of pre-emption in 1833. It has a remark to the effect that till 1250 Fasli, the village was in ruins, without settlement; that, in 1257 Fasli, it came under Government protection; that no revenue was [illegible] till 1260 Fasli; and that revenue was being realized since 1240 Fasli. Further, it shows that the settlement for payment of Rs. 10 revenue was made for the period from 1247 to 1266 Fasli, with Babu Ram, Lachhmi and Kesar, *muqaddams*. There is nothing in this report to show that the village was cancelled before it became part of British territory, or, was ever owned by a single proprietor. The report mentions a sale by one Lala Shambhu Lal to Lala Har Dayal on the 9th of May, 1855. The village might have been in ruins, but, from that fact, it does not follow it was uninhabited. Its condition could affect its value but not ownership. According to the decision in *Dayaal v. Sirajl v. Ahmad Sayed Khan* (1), a *wajib-ul-arz* has evidential value as regards the existence of a custom. The presumption raised by the *wajib-ul-arz* of the two settlements stands unrebutted. * * *

Dr. *Kailas Nath Katju* and Pandit *Hari Kishen Kaul*, for the appellant.

Dr. *S. M. Sulaiman*, Munshi *Jang Bahadur Lal* and *Shiva Prasad Sinha*, for the respondents.

MUHAMMAD RAFIQ and PIGGOTT, JJ.:—The question in issue is whether the plaintiff claiming pre-emption has proved the existence of a custom of pre-emption in the village in suit. The entries in the *wajib-ul-arz* drawn up at the two settlements of 1833 and 1860 are *prima facie* records of an existing custom. There were at least three co-sharers in the former year and a number of co-sharers in the latter year. The main contention before us is that this evidence is sufficiently rebutted by a note recorded at the time of the settlement of 1860, to the effect that this village had been waste or desolate up to the year 1829. We do not think this is sufficient to rebut the presumption raised in favour of the plaintiff. We dismiss this appeal with costs.

Appeal dismissed.

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Nov., 2.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Lindsay.

BRIJ NARAIN RAI (DEFENDANT) v. KEDAR NATH AND ANOTHER (PLAINTIFFS) AND SITAL PRASAD AND OTHERS (DEFENDANTS).*

Pre-emption, right of—Co-sharers in property—Sale private but involuntary

The fact that a sale of property is involuntary, as, for example, a private sale by the official receiver in insolvency, is not by itself sufficient to bar the right of pre-emption. *Ghulam Mohi-ud-din Khan v. Hardeo Sahai* (2), distinguished.

THE facts of the case were as follows:—

Defendants, second party, and plaintiffs were near relations, the former being uncles and cousins of the latter. They

* First Appeal No. 148 of 1919, from a decree of Kameshwar Nath, Subordinate Judge of Ghazipur, dated the 6th of January, 1919.

(1) (1914) I. L. R., 37 All., 139.

(2) (1920) I. L. R., 42 All., 402.

were declared insolvent by the Calcutta High Court in 1912. Later on, the insolvency, in respect of the [illegible] was cancelled.

The official assignee was appointed receiver [illegible] of defendants, second party. He sold the [illegible] to the defendant, first party, Raja Brij Narain Bahadur [illegible] of a sale-deed, executed on the 22nd of September, 1916. Plaintiffs brought the present suit for pre-emption on the ground that they were near relations and co-sharers.

The defence mainly was that the sale was made after "issuing public proclamation" and amounted to a sale by public auction and the plaintiffs had full knowledge of the sale.

The Subordinate Judge decreed the suit.

Munshi *Shiva Prasad Sinha* (with him Dr. *S. M. Sulaiman*), for the appellant, submitted that the custom of pre-emption, if any, applied to a voluntary sale and not to a non-voluntary sale which the present sale was. He quoted *Ghulam Mohi-ud-din Khan* v. *Ibadat Sahai* (1). He also submitted that both the points were taken into account in that case, the knowledge of the sale and the [illegible] character. At page 108 the judgment reads: "But over and above that we think that the plaintiff are out of court for another reason. They had full notice of the intention of sale." This showed that both facts were considered. He also relied upon *Todar Singh* v. *Kehri Singh* (2). The Subordinate Judge had found that the pre-emptor and vendor were joint in estate. That meant that one and the same man had both sold the property and was pre-empting the sale. He cited *Pratap Narain Singh* v. *Shiam Lal* (3).

Dr. *M. L. Agarwala* (with him Munshi *Hardeva Sahai*), for the respondent, was not called upon.

MUHAMMAD RAFIQ and LINDSAY, JJ.: The two pre-emptors to the present appeal are admittedly descended from a common ancestor. The defendant, [illegible] No. 3-7 were indebted to some one in Calcutta and, at the instance of their creditors, were declared insolvent in 1912. The [illegible] were residents of Ghazipur and owned property in the district of Ballia. Under the orders of the insolvency court, their property, situate in the district of Ballia, was made over to the official receiver. The latter disposed of the property by

(1) (1920) I. L. R., 42 All., 402.
(2) (1919) 17 A. L. J., 230.
(3) (1920) I. L. R., 43 All., 204.

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private sale in favour of defendant appellant, Raja Brij Narain Rai, on the 22nd of September, 1916. The deed was registered on the 30th of September, 1916. The plaintiff respondents Nos. 1 and 2, who are minors, sued under the guardianship of their mother for the recovery of the said property on the ground of pre-emption. They alleged that they and the insolvents were descended from a common ancestor and were co-sharers in the property in which the shares of the insolvents were sold by the official receiver to the defendant appellant. The claim was resisted on various pleas, with two of which we are principally concerned in this appeal. It was urged, on behalf of the contesting defendant, that the plaintiffs had knowledge of the proposed sale and did not choose to purchase the property in suit and, therefore, they have lost their right of pre-emption. Moreover, the sale made by the official receiver in favour of the defendant Raja was an involuntary sale in respect of which the right of pre-emption would not prevail. The learned Subordinate Judge came to the conclusion, on the evidence in the case, that the plaintiffs had no knowledge of the proposed sale. He was also of opinion that the sale in favour of the contesting defendant, though made by an official receiver, did not stand on the same footing as a sale at a public auction and would not defeat the right of pre-emption.

In appeal before us it is contended strenuously on behalf of the defendant appellant that the evidence shows that the plaintiffs had knowledge of the sale in question and that, in any case, the sale being an involuntary sale, *i.e.*, one under the orders of the court, no claim can be urged on the basis of pre-emption. The evidence on the record with regard to the alleged knowledge of the plaintiffs shows that the official receiver published in the Calcutta papers, both Hindu and English, his intention of selling the property in suit. There is no evidence that the plaintiffs, who are minors now and who were minors at the time of the publication in the Calcutta papers, were old enough to read those papers or that anybody else read the said papers to them. In our opinion the learned Subordinate Judge was right in holding that the plea for the defence that the plaintiffs knew of the proposed sale has not been made out. The second objection based upon the allegation of the sale being involuntary, has also not been established. It is based on the contention that if a vendor does not sell the property himself, but it is sold under the orders of a

court and the sale takes place publicly, no claim based on pre-emption can be brought in respect of that sale. We have been referred to the case of *Ghulam Mohi-ud-din Khan* v. *Hardeo Sahai* (1) and special stress is laid upon the passage at page 407. We think that the facts of that case were quite different from the facts of the present case. The principal reason for the decision of that case is given at the bottom of page 407. It was said in that case :

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> They had full notice of the intention of sale. They were publicly invited to the auction. One did not appear, the other appeared through an agent and made no attempt to purchase. This action on their part was, in our opinion, tantamount to a refusal to purchase, and if it was necessary for the official assignee to follow the custom laid down in the *wajib ul arz*, he actually did follow that custom, for he publicly invited those co-sharers to purchase and they publicly refused to purchase.

In the case before us the sale was not a sale in the sense of a public auction. It is a fact that notice was given of the intention to sell the property, but as we have remarked above, the plaintiffs never knew of that notice and the sale was not a public sale. With regard to properties sold at court auctions, there is a mode of pre-emption prescribed which is to be found in order XXI, rule 89. In our opinion the plaintiffs cannot be deprived of their right by the fact that the sale was an involuntary sale. The appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Stuart and Mr. Justice Gokul Prasad.

RAM NARAIN (DEFENDANT) *v.* SOMI (PLAINTIFF) AND JAI NARAIN (DEFENDANT).* 1923 *Nov.*, 7.

Mortgage—Prior and subsequent mortgagees—Rights of, inter se—Both becoming purchasers of the same mortgaged property.

Two mortgagees of the same property, each without impleading the other as a party, brought suits on their respective mortgages and obtained decrees for sale, in execution of which each purchased the property mortgaged. The second mortgagee was the earlier in date of suit, and obtained possession.

Held that it was not open to the first mortgagee to sue the second mortgagee for possession or, in the alternative, for a decree directing redemption of the plaintiff's mortgage by the defendant. *Madan Lal* v. *Bhagwan Das* (2), followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. *Surendra Nath Sen* and Pandit *Narmadeshwar Prasad Upadhiya*, for the appellant.

* Second Appeal No. 1390 of 1921, from a decree of F. D. Simpson, District Judge of Saharanpur, dated the 10th of August, 1921, reversing a decree of Muhammad Shafi, Subordinate Judge of Saharanpur, dated the 27th of January, 1920.

(1) (1920) I. L. R., 42 All., 402.
(2) (1899) I. L. R., 21 All., 235.

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Babu *Piari Lal Banerji*, for the respondents.

STUART and GOKUL PRASAD, JJ.:—The only question in this appeal is whether the plaintiff respondent, who is the purchaser of the property in dispute under a prior mortgage decree, to which the defendant appellant was not parties, has a right to eject the defendants, the purchasers in execution of a decree, based on a puisne mortgage, to which the prior mortgagees were not parties. It appears that in the year 1916 the second mortgagees obtained a decree on foot of their mortgage for sale of the property and purchased the property on the 26th of April, 1917, in execution of such decree. To this suit the prior mortgagee was not made a party. In the year 1916 the prior mortgagee got a decree for sale on foot of her mortgage, but to this suit neither the puisne mortgagee nor the purchaser in execution of his decree were made parties. The prior mortgagee got a decree and put the property to sale and, in execution thereof, purchased it herself. She has obtained possession over three-fourths of the property and has not got possession over one-fourth, which is in the possession of the defendants.

She brought the present suit for recovery of possession of the remaining one-fourth also, and, in the alternative, for a conditional decree that the defendant should redeem her mortgage, and in case of his failure to do so, she should be put in possession of the property in dispute.

The first court partially decreed the suit. The learned District Judge in appeal has passed a decree in favour of the plaintiff, to the effect that the defendant should redeem her by paying the sum of Rs. 1,610-13-0, and in case of his failure to do so within six months, possession of the property should be delivered to the plaintiff.

The defendant comes here in second appeal and the contention raised on his behalf by his learned vakil is that such a suit is not maintainable. This contention is fully covered by an authority of this Court in *Madan Lal* v. *Bhagwan Das* (1). That case is on all fours with the present case and this appeal must therefore be allowed on the ground that the plaintiff has no right to possession of the property under the mortgage on which she bases her title. It was a simple mortgage and not possessory mortgage. The suit was misconceived and should have been dismissed. We therefore allow the appeal,

(1) (1899) I. L. R., 21 All., 235.

set aside the decrees of the courts below and dismiss the plaintiff's suit with costs in all courts. 1923

RAM NARAIN v. [illegible]

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Sayed RAM PRASAD AND ANOTHER (DEFENDANTS) v. [illegible] AND OTHERS (PLAINTIFFS)* [illegible]

Jurisdiction—Civil and Revenue Courts—Suit for [illegible]—Question of fact—No question raised as to plaintiff's status as a tenant.

A suit for a declaration that the plaintiff [illegible] of certain trees and for damages for the alleged unlawful [illegible] such trees by the defendant, the plaintiff not asking for any declaration of his status as a tenant of the land on which the trees stood, which must be brought in a court of revenue, but on the contrary is one which can only be brought in a civil court.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Uma Shankar Bajpai*, for the appellants.

Munshi *Haribans Sahai*, for the respondents.

MEARS, C. J. and SAYED, J.: The facts of this suit, out of which this appeal arises, are these. The plaintiffs, Gumpat Pande, instituted a suit, in the court of the Munsif of Mahammadabad, on the allegation that he was the owner and possessor of a certain grove in the village Chak Rehan Ali. He stated that during the year 1916 the defendants had erected a shed in the grove for the purpose of their residence while plague was raging in the village and that, owing to the kindling of fires by the defendants close to the trees, some five trees in his grove had been partly burnt down, and that, subsequently, the good wood of these trees, which had been left intact by the fire, had been appropriated by the defendants. He sued accordingly for the following relief; we take this from the translation of his plaint:

"That it might be established, and it may be declared that the five burnt trees, in grove No. 573, comprised in [illegible] Others, together with other trees in Chak Rehan Ali, [illegible] declared, have been purloined by the plaintiff from, or did not [illegible] may be prohibited from collecting any [illegible] and that [illegible] Rs. 50, price of the wood appropriated by the defendants, and [illegible] Rs. 100 on account of damages for [illegible] grove, may be awarded against the defendants."

The defendants denied the claim, that they were the zamindars of the village, that the plaintiff had never been in possession of the grove in [illegible] and that he was entitled to nothing. They took other pleas.

The learned Munsif came to the conclusion that the defendants were the zamindars of the village, that the plaintiff

* Appeal No. 65 of 1921, under section 10 of the Letters Patent

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RAM PRASAD v. SUMER NATH PANDE.

had rights as a grove holder in the grove in question, that the defendants had taken away wood valued at Rs. 30 after the fire, but that they were not responsible for the conflagration. He further found that the area of the grove was less than the area stated in the plaint. He then ordered that "the plaintiff's claim for a declaration that only 5 biswas and 12 dhurs of grove-land be decreed and it is hereby declared that 5 biswas 12 dhurs of the grove land, No. 5773, belongs to the plaintiff as tenant." He awarded him Rs. 30 damages only. It will be noted that the learned Munsif gave the plaintiff, by way of declaration, not what he asked but [illegible] and, owing to this fact, the plaintiff has been put to considerable subsequent inconvenience; for, when the defendants appealed to the Additional Subordinate Judge, the first plea that was taken was that the suit was a suit for a declaration as to the nature of a tenancy, which could only be decided by a rent court under section 95 of Local Act II of 1901. The learned Subordinate Judge accepted the plea and dismissed the suit. His view was upheld by a learned Judge of this Court.

It was not, however, brought to the notice of the lower appellate court, or the learned Judge of this Court, that the plaintiff had never asked for a declaration as to the nature of a tenancy. He asked for something very different—for a declaration as to his possession of certain trees. We do not accept the view that the civil court had no jurisdiction to try this matter. We take the view that only a civil court could have decided this matter, which in no way turned upon the title of the plaintiff to the land upon which the trees stood. True, he had stated that he was a grove-holder, and in the course of the proceedings it had been laid down almost in so many words that he was an occupancy tenant, but he never asked in his plaint for any declaration as to a tenancy and it was not, in any way, necessary to grant him one.

As the lower appellate court dismissed the suit on a preliminary point and did not decide the questions of fact, it is necessary either to remit the case to the courts below for the determination of findings of fact, or to determine them ourselves under the provisions of section 103 of the Code of Civil Procedure. There has been unfortunate delay, and this comparatively petty matter has already been before the courts for six years. It is unnecessary to give any additional reason why we prefer to determine the questions of fact ourselves. It is

within our power to do so, as the [illegible] sufficient for the [illegible] We [illegible] undisputed [illegible] and [illegible] owner[illegible] of all the trees [illegible] 12 dhurs in plot No. [illegible] and that these trees [illegible] burnt and the unburnt wood [illegible] defendants. We find that [illegible] fere with his [illegible] without [illegible] which has so far not been [illegible] We [illegible] him a declaration that the trees [illegible] dhurs of No. 57/3 in Chak Rawan [illegible] trees standing [illegible] have [illegible] and that the defendants [illegible] possession of the [illegible] Rs. 30 damages [illegible] the cost of the [illegible] the trial court [illegible] that the defendants [illegible] plaintiff in all [illegible] which we grant. The [illegible] of 1921.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

ABDUL [illegible] AND OTHERS [illegible] v. [illegible] DEVAKINANDAN AND KARAN [illegible]

Plaint, [illegible] allegations made [illegible] within the [illegible] of a plaint for possession by proprietor.

Where a [illegible] in order to [illegible] and to [illegible] date of the event [illegible] notice, to [illegible] the [illegible]

THE facts of the [illegible] ment of the Court.

Dr. [illegible] North [illegible] and Munshi [illegible], for the appellants.

Mr. [illegible], for the [illegible].

MEARS, C.J., and BANERJI, J.: [illegible] interesting and [illegible] point on the [illegible] One Ahmad Said [illegible]

* First Appeal No. 191 of 1921, from a decree of [illegible], Subordinate Judge of Farrukhabad, dated the 15th of February, 1921.

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ABDUL GHAFUR v. NUR-UD-DIN AHMAD.

imposed upon, and, in our view, when he was on the question of jurisdiction, he misled himself by regarding this as a *bond fide* case in which the proper test of jurisdiction is the statements which are made in the plaint and the nature of the claim before him. That is, no doubt, the general rule; but when the plaintiff was boldly setting up allegations that he himself knew to be false, for an indirect purpose in abuse of the process of the court, it was the duty of the Judge to consider it from that point of view. We think that, although he did come to that conclusion, the logical effect of that finding never seems to have occurred to him; and he ought not to have proceeded with the hearing of the case upon the merits, but ought to have decided as a matter of fact that the plaint was designedly drafted with known false allegations inserted with the object of obtaining a hearing in a court which in truth had no jurisdiction, and that he, having come to that conclusion, should have returned the plaint.

We, therefore, allow this appeal, set aside the decree of the lower court and direct the plaint to be returned to the plaintiff for presentation in the proper court. The appellants will have their costs of this appeal in this Court and in the court below.

Appeal allowed.

Before Mr. Justice Piggott and Mr. Justice Walsh.

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Nov., 13.

BHAGWAN DAS (APPLICANT) v. MANGALIA (OPPOSITE PARTY).*

Guardian and minor—Application for removal of guardian of person—Repeated applications on similar grounds—Res judicata.

Held that the duly appointed guardian of the person of a minor should not be called upon to resist successive applications for his or her removal based upon the same set of facts.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Hari Kishen Kaul* (for Dr. *Kailas Nath Katju*), for the appellant.

Dr. *Surendra Nath Sen*, for the respondent.

PIGGOTT and WALSH, JJ. :—In the year 1915 Musammat Mangalia was appointed guardian of the person and property of her minor son, Ganga Prasad. In the year 1920 Bhagwan Das, father-in-law of the minor, applied for the removal of Musammat Mangalia from the guardianship both of the person and of the property, making a number of allegations

* First Appeal No. 89 of 1922, from an order of Baijnath Das, Additional Judge of Cawnpore, dated the 9th of March, 1922.

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against her. On this application, it so happened that two successive orders were passed by officers holding the District Judgeship of Cawnpore, and one of these orders came before this Court, in appeal, in the year 1921. As to the effect of these orders, we entertain no doubt. Musammat Mangalia was removed from the guardianship of the property of the minor and Bhagwan Das was appointed in her place. The court refused to remove her from the guardianship of the person of the minor. On the 16th of February, 1922, Bhagwan Das presented to the District Judge the application out of which this appeal arises. It is curiously drafted and seems to ignore the result of the previous litigation. There is also a passage in it which leaves one in doubt whether Bhagwan Das himself desired to resign the office of guardianship of the property of the minor to which he had been appointed. The application, however, has not been so interpreted by the District Judge, and we have not been asked to reconsider the view which he took of it in respect of this matter. The point, however, is this, that Bhagwan Das seeks to treat the question of the guardianship of the person of the minor as still open, and asks the Court to go into the question of the relative claims of himself and of Musammat Mangalia, as if there were at present no guardian of the person of the minor in existence. The District Judge has rightly held that the effect of the orders previously passed was to confirm Musammat Mangalia in the position of guardian of the person of the minor. The question, therefore, is whether, in this fresh application of the 16th of February, 1922, Bhagwan Das has shown cause for her removal from the guardianship of the person. In the main, this application puts forward the same facts which were considered by the District Judge of Cawnpore in the year 1921. There is one fresh allegation, as to the residence of Musammat Mangalia's second husband in the house which Musammat Mangalia continues to occupy as guardian of her minor son. This would not in itself be a cause for her removal. It has been contended before us that orders in a guardianship matter cannot have the effect in law of *res judicata*. It is not a question, however, of the operation of section 11 of the Code of Civil Procedure. The question is whether the duly appointed guardian of the person of a minor is to be called upon to resist successive applications for his or her removal, based upon the same set of facts each time. In our opinion, the District Judge was right in dismissing the

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BHAGWAN DAS v. MANGALIA.

application of Bhagwan Das on the ground on which he has substantially proceeded, namely, that Musammat Mangalia was the lawfully appointed guardian of the person of the minor and that no fresh cause was now being shown for her removal from that office, over and above the facts which had been put forward before and duly considered by the District Judge in the year 1921. On these grounds we dismiss this appeal with costs

Appeal dismissed

Before Mr. Justice Piggott and Mr. Justice Walsh.

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Nov., 13.

RAM SARUP AND OTHERS (D. [illegible]) v. NARAIN DAS (JUDGMENT-DEBTOR).*

Execution of decree—Preliminary decree passed against a deceased defendant—Final decree passed, [illegible] erroneously, against [illegible] being his representative. Distinction between such a decree [illegible] passed against a person who was dead before the date of the decree.

A preliminary decree in a suit for sale on a mortgage was passed against several defendants, amongst whom were Z. and N. At the time of the preparation of the final decree the court was informed that Z. had died in the interval and N. was his legal representative, and the final decree was passed against N personally and as representative of Z. After this, an application to set aside the preliminary decree on the ground that Z. had died prior to its passing was rejected in the absence of evidence as to the date of Z.'s death. When the final decree came to be executed, objection was again raised that Z. had died before the passing of the preliminary decree, and in this proceeding evidence was taken as to the date of Z.'s death and it was found that he had died before the preliminary decree was passed.

Held that it was not the inevitable result of this finding that the final decree was a nullity, because it had in fact been passed not against Z. deceased, but against N. in both capacities, and it was not in the category of decrees passed by accident or mistake against a defendant who had died before the passing thereof.

THE facts of this case are fully set forth in the judgment of the Court.

Munshi *Panna Lal*, for the appellants.

Dr. *M. L. Agarwala*, for the respondent.

PIGGOTT and WALSH, JJ.:—This is a decree-holders' appeal in an execution matter. Technical questions of law have been raised on both sides, for the determination of which it is necessary to examine carefully and in detail the proceedings of the court below from the date of the institution of the suit to the passing of the order under appeal. The suit was one on a mortgage. It was instituted on the 12th of December, 1916, and there were a large number of defendants. The case came before the trial court on the 2nd of March, 1917.

* First Appeal No. 495 of 1921, from a decree of Gauri Prasad, Second Additional Subordinate Judge of Aligarh, dated the 25th of July, 1921.

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when it was found that only one defendant, named Nanhu, had entered an appearance. Service on all the other defendants was found to have been sufficient and an order was passed that the hearing of the suit would continue *ex parte* as against all these other defendants. Nanhu applied for time, and, it appears, that the hearing of the suit was considerably delayed on this man's application. We are told that the reason for this was that Nanhu was absent on field service, but we are not really concerned with the reason for the delay. It is sufficient for us to note that a preliminary decree for sale under the provisions of order XXXIV, rule 4, of the Code of Civil Procedure was finally passed on the 8th of April, 1920, the date fixed for payment being the 8th of October of the same year. On the 8th of November, 1920, the decree-holders presented an application asking the court to prepare a decree absolute for sale under order XXXIV, rule 5, of the Code of Civil Procedure. They recited the necessary fact that no payment had been made under the preliminary decree. They went on to assert that three judgment-debtors named in the application had died in the interval since the passing of the preliminary decree of the 8th of April, 1920. The names of two of these persons and the proceedings taken in respect of them are no concern of ours at present. The third judgment-debtor, alleged to have died in the interval between the 8th of April and the 8th of November, 1920, was one Zahiri Mal. In respect of this man it was stated in the decree-holders' application that his legal representative was Narain Das, already impleaded on the record as a defendant in his personal capacity. There ought to have been a formal prayer that the legal representatives of the other two deceased judgment-debtors or defendants should be brought on to the record and that an entry be made on the record that Narain Das is now impleaded as the legal representative of the estate of Zahiri Mal, as well as in his personal capacity. As a matter of fact the only prayer in the application was that the names of the deceased defendants be removed from the record and a final decree passed against other defendants. This application of the 8th of November, 1920, was supported by affidavit, but the court did not cause notice of the application to issue, either to Narain Das or to the persons named as the legal representatives of the other deceased defendants. Apparently the court acted upon an incorrect and misleading office report, in which it was stated that the legal representatives of the deceased

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defendants named in the affidavit " are already on the record." On the strength of this report the court caused to be passed, on that very same date, namely the 8th of November, 1920, a decree absolute for sale. In this decree Narain Das appears as a judgment-debtor both in his personal capacity and as representing the estate of the deceased defendant, Zahiri Mal.

On the 17th of January, 1921, the decree-holders applied for execution of this final decree, and, on the 18th of February, 1921, Narain Das filed an objection in which he alleged that Zahiri Mal had died prior to the passing of the preliminary decree of the 8th of April, 1920, and contended that the decree, as it stands, is incapable of execution. His prayer was that the application for execution made by the decree-holders may be struck off. In this application to the court Narain Das does not say that he himself is not, in fact, a proper person to be brought on to the record as the legal representative of the estate of Zahiri Mal, or suggest any other person or persons as the proper legal representatives of the said defendant's estate. Further, on that same date, namely the 18th of February, 1921, Narain Das presented another application to the court. This was that the *ex parte* decree of the 8th of April, 1920, that is to say, the preliminary decree for sale, should be set aside under order IX, rule 13, of the Code of Civil Procedure. It is not clear why he did not apply to have the final decree of the 8th of November, 1920, which was also *ex parte* as against him, set aside; but the application on the record relates only to the preliminary decree. In this application it was definitely alleged that Zahiri Mal had died on the 28th of May, 1919. The court disposed of the application by an order of the 27th of June, 1921. It is not necessary for us to criticize that order, but there can be no doubt as to its meaning and effect. The court noted that in the month of February, 1917, Zahiri Mal had been personally served with notice of the suit. It took up the position that Zahiri Mal having admittedly died on some subsequent date, the burden of proving the date of his death was on the party which asserted that death to have occurred prior to the 8th of April, 1920. It went on to note that Narain Das had laid no evidence before it to prove the allegation that Zahiri Mal had died on the 28th of May, 1919, or was dead when the preliminary decree was passed on the 8th of April, 1920. On this ground it dismissed the application of Narain Das to have the *ex parte* decree set aside. This order is dated the 27th of June, 1921.

About a month later, the court proceeded to dispose of the objection of Narain Das to the execution of the final decree of the 8th of November, 1920. In this proceeding it appears to have taken evidence as to the date of Zahiri Mal's death and records the finding that this defendant had, in fact, died on the 28th of May, 1919. Referring then to the principles laid down in two reported decisions, the court holds, not that the preliminary decree of the 8th of April, 1920, which it had already refused to set aside, is, in any way, defective or inoperative, but that the absolute decree of the 8th of November, 1920, is a nullity and cannot be put into execution. The formal order passed on this finding is that the objection be allowed with costs. Against this order the decree-holders have appealed and they have complicated matters further by electing to implead Narain Das alone.

This has obliged us to consider what is the position of the remaining judgment-debtors as matters now stand. We find that the record shows traces of some intention to proceed with the execution against the judgment-debtors other than Narain Das. But on the 26th of July, 1921, the day after the order allowing the objection of Narain Das, the court records a note to the effect that the decree-holders are taking no steps against the remaining judgment-debtors, and repeats its opinion that the decree is incapable of execution. For these two reasons it orders the application for execution to be struck off without the realization of any part of the decretal money.

The decree-holders, in their memorandum of appeal to this Court, have expressly taken the ground that, in any event, the decree under execution could not be treated as a nullity as against the judgment-debtors other than Narain Das. They would undoubtedly have succeeded upon this plea if they had impleaded the remaining judgment-debtors as respondents to the appeal. As the case now stands, we shall have to leave it to them to take action by way of a fresh application for execution in the court below, whereas, otherwise, we should have been in a position to direct that court to re-admit the application of the 17th of January, 1921, on to its pending file and to proceed with it according to law. Otherwise we do not see that their failure to implead the remaining judgment-debtors in this Court affects the position. They have appealed against an order allowing the objection of Narain Das, and none of the remaining judgment-debtors has taken any objection to the execution of the decree. It must not be

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understood, therefore, that the omission of the decree-holders to implead all the judgment-debtors as respondents to this appeal, leaves in existence any order having the effect of *res judicata* so as to prevent the execution of this decree against the judgment-debtors other than Narain Das, upon a fresh application being made.

As a matter of fact the court below was not only clearly in error, in our opinion, if it intended to hold, though we are not certain that it did so intend, that the decree was incapable of execution against the judgment-debtors other than Narain Das; but it was also in error in holding that the decree was incapable of execution against Narain Das. Our attention has been drawn to several cases bearing on the question of law dealt with in the judgment under appeal. The case of this Court, on which the court below relies, is that of *Sripat Narain Rai* v. *Tirbeni Misra* (1). We have also been referred to decisions of this Court reported in *Qutub Ali* v. *Dwarka Das* (2) and *Imam Uddin* v. *Sadarat Rai* (3). There is also a decision of their Lordships of the Privy Council in the case of *Raj Chunder Sen* v. *Ganga Das Seal* (4) which has been relied upon on behalf of Narain Das. What distinguishes the case now before us from all these, is the plain fact that the decree sought to be executed, namely, the final decree of the 8th of November, 1920, was not passed against any deceased person. The decree, as it stands, is against Narain Das personally and Narain Das as representative of the deceased defendant, Zahiri Mal. It may be that in passing this decree on the 8th of November, 1920, the trial court acted hastily and upon an affidavit in which an essential fact was incorrectly stated. We have suggested, in our review of the facts, that the trial court was misled by an incomplete and inaccurate office report. It may well be that an application by Narain Das, to have this final decree of the 8th of November, 1920, set aside as against him, would have been a very difficult application for the decree-holders to resist. The fact remains that no such application was ever made and that the attempt made by Narain Das to achieve this same purpose indirectly, by getting the preliminary decree of the 8th of April, 1920, set aside, was, rightly or wrongly, defeated by the court's order of the 27th of June, 1921. The execution court

(1) (1918) I. L. R., 40 All., 433.
(2) Weekly Notes, 1904, p. 44.
(3) (1910) 7 A. L. J., 228.
(4) (1904) I. L. R., 31 Calc., 457.

is bound by the terms of the final o[rder] have been relied upon in argument [on] that if the decree is against a person [on] on which the decree was passed, the [court] to go into the question of the death [of] cerned, and, if satisfied that the decree dead person, to treat it as a nullity [as] person is concerned. What we are [asked] treat as a nullity a final decree for sale [not] against a deceased person, but against [Narain] Das as the legal representative of the [deceased] dant, Zahiri Mal, who had died *pendente* upon which the court below was asked [to] this final decree were that it was [a] decree which had been wrongly [passed] defendant, and that the said final [decree] upon an incorrect affidavit of facts [made] to the judgment-debtor principally [the] objector Narain Das. These may [be] aside the decree of the 8th of November good reasons in law for treating it [as] execute it according to its terms. [We] this appeal and set aside the order [under] will go back to the court below and it [is] holders to make such application as [they] further execution of the decree. They [will] costs as against Narain Das, in this [Court] below.

FULL BENCH

Before Sir Grimwood Mears, Knight, Chief [Justice], Charan Banerji and Mr. Justice [Muhammad]

BADRI SINGH (DEFENDANT) [v.] [RAM]

Civil Procedure Code, order XXI, rules [58], 70, rule 92(3)—Auction sale—Confirmed in outsider's favour, in execution of possession.

At an auction sale of zamindari property [in] the sale. One of such bidders claimed [to] [pur]

* Second Appeal No. 316 of 1921, [from] Additional Judge of Bareilly, dated the 7th [of] decree of Muhammad Wahidullah, City Munsif [of] September, 1919.

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property to be sold, and his object was to take advantage of the provisions of order XXI, rule 88, of the Code of Civil Procedure. The sale-officer reported the case to the Collector who fixed a date and issued notice to both bidders. On the date fixed the co-sharer did not appear and prove that he actually was a co-sharer, and the sale was confirmed in favour of the other bidder.

Held it was not open to the co-sharer to file a suit for the recovery of possession of the property sold, in the face of the order of confirmation.

A SHARE in undivided zamindari property was put up for sale by auction by the Collector to whom the civil court decree was transferred for execution. There were two bidders, one of whom was a co-sharer in the property to be sold, and he bid level with the other, with the intention of exercising his preferential claim under order XXI, rule 88, of the Code of Civil Procedure. The sale-officer reported the bids to the Collector, who fixed a date for confirmation of the sale and issued notice to both the bidders. On the date fixed, however, the co-sharer bidder did not put in an appearance, and, there being nothing on the record to show that he really was a co-sharer, the sale was confirmed in favour of the other bidder, on the 24th of October, 1913. In 1915 the co-sharer filed a suit against the auction purchaser to recover possession of the property sold; but that suit was withdrawn, with liberty to the plaintiff to bring a fresh suit if so advised. On the 26th of July, 1919, the plaintiff filed his second suit. The first court dismissed the suit; but on appeal the lower appellate court decreed the plaintiff's claim. The defendant then appealed to the High Court.

Babu *Satish Chandra Das*, for the appellant.

The law applicable to the case is to be found in the rules framed by the Local Government under the provisions of section 70 of the Code of Civil Procedure (*vide* Vol. I of the circulars of the Board of Revenue, No. 25—II). The relevant rules however, are worded exactly as rules 88 and 92 of order XXI of the Code of Civil Procedure.

Order XXI, rule 88, makes a co-sharer a preferential bidder only, who has to follow up his bid by taking the necessary subsequent steps to have the sale confirmed in his favour by the proper court. Apart from statute such a co-sharer has no preferential right to have his competing bid at auction accepted, and his remedy also must be found within the four corners of the same statute. No right of suit is given by the statute to a co-sharer whose preferential bid is not accepted, and

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a suit like the present one is not maintainable. The ruling in the cases of *Nannu Lal* v. *Bhagwan Das* (1) and *Ram Narain* v. *Dalpat Rai* (2) may be referred to by way of analogy, though they are cases under order XXI, rules 91 and 92.

This is virtually a suit to set aside a confirmation of sale. The plaintiff cannot affect to ignore the sale as a nullity. *Malkarjun* v. *Narhari* (3). A suit to set aside a confirmation of sale is barred by order XXI, rule 92 (3). Rule 93 is the only provision which enables a court to confirm a sale. The fact that the plaintiff could not have applied under rules 89, 90 and 91 of order XXI is immaterial, because clause (3) of rule 92 is very wide and general in its terms and is not confined to those persons only who could so apply.

The suit is barred by articles 10 and 12 of the Limitation Act.

Munshi *Damodar Das*, for the respondent.

Article 10 of the Limitation Act does not apply as the property in this case was an undivided share in saleable property, incapable of physical possession, and there was no registered sale-deed. If this be taken to be a suit to enforce a right of pre-emption, article 120 will apply. *Hafiz Nigam* v. *Mansur Ali Khan* (4) and *Bholi* v. *Iman Ali* (5).

Article 12 of the Limitation Act is not applicable as the plaintiff does not ask the court to set aside a court sale. The sale is a good sale, only it ought to be deemed to be one in the plaintiff's favour by virtue of his preferential right of purchase over the other bidder who was a stranger. *Munir ud Din Ali* v. *Abdul Rahim Khan* (6).

Order XXI, rule 92 (3) of the Civil Procedure Code should be read along with clause (1) of that rule which is controlled by it. Those only who could apply under clause (1) are barred by clause (3) from bringing a suit. The present suit, therefore, does not bar the plaintiff's suit.

Babu *Satish Chandra Das* was not heard in reply.

MEARS, C. J., BANERJI and MUHAMMAD RAFIQ, JJ.

On the 20th of August, 1913, certain property in the city of

(1) (1916) I. L. R., 39 All., 114.
(2) (1920) I. L. R., 43 All., 60.
(3) (1900) L. R., 27 I. A., 216.
(4) (1901) I. L. R., 24 All., 17.
(5) Weekly Notes, 1881, p. 175.
(6) (1881) I. L. R., 3 All., 674.

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Ghausganj Narayan was put up to auction. Badri Singh and Tulsi Ram bid on that occasion, and Tulsi Ram, asserting himself to be a co-sharer, capped each bid, as it was made, with a bid of a correspondingly equal sum, intending to exercise the preferential right which is accorded to a co-sharer under the provisions of order XXI, rule 88. Badri Singh was prepared to pay Rs. 160 for the plot. So also was Tulsi Ram. A report was made of these circumstances and, in due course, the matter came up before the Collector of Bareilly, on the 24th of October, 1913, for the confirmation of the sale. In none of the courts was the document, which we are now about to read, laid before the courts. Mr. *Damodar Das* has furnished to us a certified copy of the actual order of the Collector. It is evident from that document that Tulsi Ram had been served with a notice that the matter would be heard and determined on the 24th of October. Tulsi Ram was absent, and, in his absence, there was no evidence before the Collector as to whether his allegation that he was a co-sharer had or had not a foundation in fact, and the Collector passed an order that the sale was to be confirmed in favour of Badri Singh. The actual words are: "Present, Badri Singh in person. Tulsi Ram absent, despite due service of notice. The pre-emptor Tulsi Ram has failed to appear and prove his claim to pre-empt. Sale may be confirmed in favour of the purchaser Badri Singh." After that, the usual certificate of sale was issued to Badri Singh and mutation proceedings instituted and appropriate order made in favour of Badri Singh.

In 1915 Tulsi Ram brought a suit against Badri Singh to recover possession of this property. That suit was, however, withdrawn with liberty to Tulsi Ram, if so advised, to commence a new suit. Nothing whatever was done until the 26th of July, 1919, just within six years from the date of the order of the Collector. That suit also sought to get possession of the land which had formed the subject-matter of the sale by auction, and asked for a declaration that by virtue of a right of pre-emption according to law Tulsi Ram was the owner of the shares, and also that it might be declared that the sale certificate, the delivery of possession, and the mutation of names effected in favour of the defendant were ineffectual against the plaintiff's property and, further, asked that the defendant might be dispossessed and the plaintiff put into possession.

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The question which has arisen is, whether that was a competent action to bring under the circumstances which we have already detailed.

Our attention has been drawn to order XXI, rule 92. That rule, as will be seen, is incorporated in the notification of Government, No. 1887, dated the 7th of October, 1911, in exercise of the power conferred by sections 68 and 70 of the Code of Civil Procedure of 1908. The subject which is dealt with is the sale of ancestral land in execution of civil court decrees in the United Provinces of Agra and Oudh. The operative part of rule 32 is in precisely the same language as the operative part of order XXI, rule 92. The full text of rule 32 is as follows :—"Where no application is made under rule 30 or rule 31, or where such application is made and disallowed, the Collector shall make an order confirming the sale, and, thereupon, the sale shall become absolute." Now, it is conceded that that is the only rule which gives to the Collector the power of making an order confirming the sale. It is agreed that, in the circumstances, there was, in fact, no application either under rule 30 or rule 31, and, therefore, the Collector had this one duty before him, either of confirming the sale or declining to confirm it. It was with the object of arriving at a proper decision that he had given notice to Badri Singh and Tulsi Ram to appear before him. Therefore, Tulsi Ram was given the proper opportunity of presenting the facts of his case to the Collector with a view to bring himself within the language of order XXI, rule 88, which has its counterpart in rule 29 of the rules made by the Local Government. Had he proved that he was a co-sharer, had he proved that he had made the same bid which had been made by Badri Singh, it is scarcely conceivable that the Collector would not have passed an order in favour of Tulsi Ram. Tulsi Ram had that opportunity and he did not avail himself of it, nor did he make subsequently to the Collector any application, for good reasons shown, that the indulgence should be granted to him of having the matter re-heard. What he did, in fact, was to commence his suit. The question is whether the commencing of that suit was not in direct defiance of rule 32, clause (3). We have already given the text of rule 32 and pointed out that the Collector was adjudicating on the 24th of October, 1913, on the question of confirming or refusing to confirm the sale. Clause (3) is as follows :—" No suit to set aside an order made under

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this rule shall be brought by any person against whom such order is made." Tulsi Ram was the person against whom such order was made. The order, in fact, that was made was that Badri Singh was to be declared purchaser, and we are of opinion that rule 32, clause (3), in the circumstances, is a complete answer to this suit, and Tulsi Ram was incompetent to bring it. That order of the Collector of the 24th of October, 1913, was an order made under rule 32, was good at the date of the commencement of the suit, and is good today, and no proceeding by way of suit, in our view, was capable of being instituted by Tulsi Ram on the day on which he brought this action. We are, therefore, of opinion that clause (3) operates as a bar to this action. We allow the appeal, set aside the decree of the court below and restore that of the court of first instance.

Appeal allowed.

Before Mr. Justice Piggott, Mr. Justice Walsh and Mr. Justice Lindsay.

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JHABBU AND ANOTHER (PLAINTIFFS) *v.* MUSAMMAT BATUL AND OTHERS (DEFENDANTS) *

Act (Local) No. II of 1901 (Agra Tenancy Act), section 146; schedule IV, serial No. 6—Suit for damages for unlawful distraint—Limitation—Terminus a quo—Act No. IX of 1908 (Indian Limitation Act), section 23.

The plaintiffs came into court asking for damages because, as they alleged, certain stacks of thatching grass belonging to them had been wrongfully distrained by the defendants on the 15th of May, 1919, and had not been released until the 16th of September. Meanwhile, by reason of the rains coming on, the stacks had become soaked with water and were valueless. The suit was instituted on the 12th of December of the same year.

Held that, although the plaintiffs' pleadings were faulty, the suit was in substance a suit under clause (1), rather than under clause (2), of section 146 of the Agra Tenancy Act, 1901, and section 23 of the Limitation Act applied to it; and the cause of action, in effect, took its origin from the day on which the distraint came to an end.

Dambar Singh v. *Balwant Singh* (1) and *Dalip Upadhia* v. *Gauridat Upadhia* (2), referred to.

THE plaintiffs alleged that the defendants, on the 15th of May, 1919, wrongfully and maliciously distrained, under colour of the provisions of the Tenancy Act, some thatching grass of the plaintiffs which they had cut and stacked for sale at a profit. The plaintiffs brought a suit to contest the distraint, and the distraint was set aside on the 16th of September, 1919. While under distraint, however, the grass was

* Second Appeal No. 1496 of 1921, from a decree of Murari Lal, Additional Judge of Moradabad, dated the 30th of May, 1921, confirming a decree of Muhammad Abdul Razzak, Assistant Collector, First Class of Bijnor, dated the 10th of January, 1921.

(1) (1909) 8 A. L. J., 503.

(2) (1881) 2 Legal Remembrancer (B. and R. Series), 61.

utterly damaged by rain and flood, and the plaintiffs had knowledge of this in July, 1919. The plaintiffs filed a suit on the 12th of December, 1919, for damages, assessing them at the full value of the grass. The essential cause of action put forward and relied upon by the plaintiffs was the wrongful nature of the distraint. The defendants pleaded limitation. The Assistant Collector treated the suit as one falling wholly within the second clause of section 146 of the Tenancy Act and held it to be barred by limitation. On appeal it was contended that the cause of action did not accrue till the 16th of September, 1919, but the appellate court took the same view as the first court and dismissed the appeal. The plaintiffs came in second appeal to the High Court.

Babu *Piari Lal Banerji*, for the appellants.

The limitation applicable to the suit is that laid down in the fourth schedule to the Tenancy Act, Group A serial No. 6, and the question arising thereunder is as to when the right to sue accrued. The basis of the cause of action for a suit under section 146 is the injury which the owner of the property distrained has thereby sustained, *i.e.*, the injury actually sustained and not merely the potential. The day on which the property was released was the date on which the plaintiffs were in a position to know and ascertain the extent of the injury actually sustained; that, therefore, is the date on which the cause of action became complete. So long as the distraint continued, there were so many possibilities open that it could not be known what the injury actually sustained in the end might or might not be. It might even happen that the distrainor might choose to take the damaged property, whatever it was worth, in satisfaction of his claim. Deterioration or destruction of the property is by itself no more than a potential injury; for, injury to the subject-matter of the distraint is not necessarily injury to the plaintiffs. The plaintiffs did not suffer damage on the date on which the crops were damaged, but on the date on which they got them back and did not get full value.

So far as the claim is based upon the wrongful nature of the distraint, apart from the fact of the deterioration during distraint, it is also clear that the suit is not barred by limitation. The issue about the wrongful character of the distraint was not decided till the 16th of September, 1919, and any suit instituted before that date would have been premature.

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The only two reported cases touching the question are *Dalip Upadhia* v. *Gauridat Upadhia* (1) and *Dambar Singh* v. *Balwant Singh* (2). The first is in my favour. The second was a case in which the crops had been released on furnishing of security. That circumstance makes the case entirely distinguishable. When security is given under section 143 the tenant becomes absolutely entitled to the crops and gets them back, and no further subsequent complications or considerations can possibly arise, and his cause of action is at that moment complete. As a matter of fact, it was held in that case that the cause of action accrued on a date even subsequent to the release from distraint. Also, there the distraint was found to be lawful, although the amount was not correct.

It is significant that while article 28 of the Limitation Act makes the date of the distress the starting point of limitation for a suit for compensation, under the Tenancy Act the starting point is described in language which is more related to the circumstances of each case; this shows that it was not contemplated that limitation should invariably run from the date of the distraint.

To hold that limitation runs from the date of the distraint would cause great hardship in cases where the suit under section 142 is not decided till more than three months have elapsed from the distraint. It can hardly be said that clause (5) of section 142 furnishes an adequate remedy in such cases; for, its scope is limited and is analogous to that of section 250 of the Criminal Procedure Code. It is not every illegal distraint that is contemplated by section 142 (5). Also, the right of suit given by section 146 is altogether independent of the right of application under section 142 (5).

At all events, having regard to the fact that the plaintiffs' cause of action is fundamentally based on the wrongful nature of the distraint, and having regard to the nature of the injury sustained by them, not only from the damage during the distraint but also from the loss of good market, the case is one of a continuing wrong and the provisions of section 23 of the Limitation Act apply to the case. The wrong continued up to the date of release from distraint.

George Banerji (for Syed *Raza Ali*), for the respondents.

(1) (1881) 2 Legal Remembrancer (R. and R. Series), 61.
(2) (1900) 8 A. L. J., 563.

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If the suit were confined to the ground of wrongful distraint alone, it might be argued that the cause of action was a continuing wrong, continuing up to the date of release of the property, within the meaning of section 23 of the Limitation Act. But where, as in the present case, damages result from the negligence of the distrainor during the continuance of the distraint, the right to sue arises when the damage takes place, or at least when that is known to the owner, and not when possession is regained. The injury caused by the flooding was caused on a particular date and is quite apart from the continuing distraint. Even successive occasions of wetting are separate and self-contained, and there is no continuous cause of action as contemplated by section 23.

Damages based on the loss of good market were not made part of the plaintiffs' case, except perhaps in the first court only.

It is the factum and not the measure of the damages which gives rise to the cause of action. Its ascertainment is no part thereof.

I rely on the decision in *Dambar Singh* v. *Balwant Singh* (1), which is fully applicable to the present case.

PIGGOTT, WALSH and LINDSAY, JJ.:—The suit out of which this appeal arises was under section 146 of the United Provinces Tenancy Act, No. II of 1901. As it has been disposed of upon a question of limitation and this is the only question before us today for determination, we have to look narrowly at the frame of the plaint in order to see whether, on the allegations therein made, the plaintiffs were or were not seeking their remedy within the period prescribed by law. What the plaintiffs say is that they were lessees of one village and the defendants lessees of another, and that there was bad blood between them because the plaintiffs had succeeded in securing a lease which the defendants were coveting. The plaintiffs had cut and stacked, from the land within the purview of their lease, a large quantity of thatching grass which they hoped to sell at a substantial profit. The defendants, it is alleged, wrongfully and maliciously levied a distraint, under colour of the provisions of Chapter IX of the Tenancy Act, upon this grass of the plaintiffs. The immediate result of this was that the plaintiffs missed their market and were unable to sell their grass, while the defendants were disposing

(1) (1900) 6 A. L. J., 503.

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of theirs. In the meantime the rainy season began and the land upon which the plaintiffs' stacks were standing was flooded. The plaintiffs brought a suit to contest the distraint and finally succeeded in obtaining an order from the court setting the distraint aside. When, however, they became entitled to re-enter into possession of their own grass, the stacks had been so damaged by rain and flood as to be utterly worthless. Therefore the plaintiffs claimed the full value of the stacks, as the correct measure of damages for the wrong done to them by the defendants in wrongfully distraining the same. As regards dates, we may note that the distraint was levied on the 15th of May, 1919. The suit under section 142 of the Tenancy Act, to contest the distraint, was promptly instituted, but was not terminated by the court's order releasing the grass until the 16th of September, 1919. The present suit for damages was instituted on the 12th of December, 1919. The Assistant Collector examined the parties and fixed various issues, the first of which was an issue of limitation. He took evidence tendered by both parties. We have thought it worth while to look at the statements of the parties and the evidence produced by them, and, having examined the record in order to make it perfectly clear to our minds what the parties were really fighting about in the trial court, it seems to us even clearer than it would have been upon a more examination of the plaint, that the essential cause of action put forward and relied upon by the plaintiffs was the wrongful nature of the distraint. The Assistant Collector, however, treated the suit as one falling wholly and solely within the purview of the second clause to section 146 of the Tenancy Act. Following the decision of this Court in the case of *Dambar Singh* v. *Balwant Singh* (1), he held that it was barred by limitation. The plaintiffs appealed to the district court. In their memorandum of appeal they undoubtedly took the point that the finding against the plaintiffs on the question of limitation was contrary to law, and, further, that their cause of action accrued to them on the 16th of September, 1919, that is on the date on which the distraint terminated under the orders of the court, and not previously. They did not, however, take in plain terms the plea which, in our opinion, they should have done, namely, that the suit as brought was in its essence one falling under the first, and not under the second, clause of section 146 aforesaid. The

(1) (1909) 8 A. L. J., 503

District Judge, dealing with the matter on the same lines which had been followed by the court of first instance, affirmed the decision of that court and dismissed the appeal. There was a second appeal to this Court and we may make the same comment regarding the drafting of the memorandum of appeal to this Court. We have before us, however, the referring order of the learned Judges before whom the appeal was first argued, and that order makes it clear enough that the case for the plaintiffs appellants was presented to that Bench in a two-fold form :—First, it was contended that, treating the suit as one under the second clause of section 146 of the Tenancy Act, it was nevertheless within limitation under serial No. 6 of the fourth schedule to the said Act, because the right to bring this suit did not accrue to the plaintiffs before the 16th of September, 1919. Secondly, it was contended that, even if this first plea be repelled by the Court, the suit being essentially based upon the allegation that the distraint levied by the defendants was wrongful distraint, it was a suit upon a continuing wrong within the meaning of section 23 of the Indian Limitation Act, No. IX of 1908. That wrong being the distraint maliciously levied by the defendants, had continued until the distraint was brought to an end under the orders of the court. Therefore, from this point of view, the plaintiffs' suit was rightly brought within three months of the 16th of September, 1919, the date on which the distraint came to an end.

We now turn to examine the first two clauses of section 146 of Local Act No. II of 1901. In so far as these clauses are applicable to the facts of the present suit, the first clause gives a right to institute a suit for compensation against the distrainor, "if any person under colour of this Act distrains any property otherwise than according to the provisions of this Act." The claim must be for compensation for any injury which the plaintiff has thereby sustained, that is to say, has sustained in consequence of this distraint wrongfully made under colour of the provisions of the Tenancy Act. The second clause gives the owner of distrained property a right of action for damages, independent altogether of the question whether the distraint was or was not lawful and proper. The cause of action for a suit under this clause is the distrainor's not having taken proper precautions for the preservation of the distrained property and consequent loss, damage or destruction of the same. What was laid down in *Dunbar Singh* v. *Balwant Singh* (1) was, in effect, that the cause of action for a

(1) (1909) 8 A. L. J., 503.

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suit under this clause is the loss, damage or destruction to the property and that, consequently, it is to the date of such loss, damage or destruction that the court must look when computing the prescribed period of limitation, which is three months from "the date on which the right to sue accrued." The words above quoted from the fourth schedule to the Local Tenancy Act are properly general in their effect, because they have to cover the three different kinds of suits provided for by section 116 of the Act. As applied to the second clause, however, their effect seems to us to have been rightly stated in the case of *Dambar Singh* v. *Balwant Singh* (1). Here the plaintiffs, on their own admission, knew in the month of July that their stacks of grass had been "destroyed", ruined by rain and flood. They had a right to bring their suit on the basis of this destruction, independently altogether of the question whether the distraint levied upon them was lawful or the reverse; but they were bound to bring this suit within three months of the date of the destruction of their property in consequence of the negligence of the defendants. In so far, therefore, as the courts below have acted upon this principle of law, we think their decisions were correct.

Coming, however, to what we have stated as the alternative argument put forward in support of this appeal, we feel satisfied that it is in substance sound and ought to prevail. We repeat that the suit was, in our opinion, essentially based upon the allegation that the distraint levied by the defendants was a wrongful and malicious act done under colour of the provisions of the Tenancy Act. The wrong inflicted by an unlawful distraint continues and is renewed every day that the distraint lasts, the lawful owner of the property being thereby restrained from making use of it or exercising any right of ownership over it. In effect, therefore, as was suggested long ago in the decision of the Board of Revenue quoted in the referring order, *Dalip Upadhia* v. *Gauridat Upadhia* (2), the cause of action for a suit for damages in respect of a wrongful distraint takes its origin from the day on which the distraint came to an end and may be lawfully instituted within the prescribed limitation period of three months calculated from the said date. This suit was therefore, in our opinion, within time. We have commented upon the imperfect nature of the pleadings set up by the plaintiffs, but we do not wish to penalize them further than by directing the costs here and

(1) (1901) 8 A. L. J., 503.
(2) (1881) 2 Legal Remembrancer (R and R. Series), 61.

hitherto to be costs in the cause. We set aside the decrees of both the courts below and send the case back to the court of first instance to be tried according to law, with reference to the finding which we have recorded on the limitation question.

APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

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DARSHAN LAL AND OTHERS (DEFENDANTS) v. SHIBJI MAHARAJ BIRAJMAN (PLAINTIFF) AND RAM LAL AND OTHERS (PROFORMA D) *

Idol—Suit by, on account of alleged misappropriation of endowed property —Civil Procedure Code, section 92—Difference between an idol and an infant.

When an endowment has been made in favour of an already existing idol installed in a temple, it is within the competence of the idol as a juristic person to sue, through the agency of the priest of the temple, in respect of malversation of the endowed property, and this suit would not fall within the purview of section 92 of the Code of Civil Procedure. In such a case the human plaintiff would have to prove his right to sue on behalf of the idol. An idol cannot be regarded in the same light as an infant, in the sense that any benevolently disposed person might be permitted to sue on its behalf as its next friend in regard to an alleged misappropriation of property dedicated to its worship.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. *S. M. Sulaiman*, for the appellants.

Munshi *Harnandan Prasad* and Munshi *Balcshwari Prasad*, for the respondent.

PIGGOTT and WALSH, JJ. :—This is an appeal against an order of remand, and the pleadings of the parties require to be carefully studied if the particular point about which the courts below have differed is to be rightly appreciated. On the face of it, the suit is one brought by the idol, Shibji Maharaj, installed in a certain temple, suing as a juristic person, through Swami Lachhmi Nand, described as officiating priest and manager of the affairs of the temple. The persons impleaded as defendants are alleged to be wrongfully appropriating the income of the property which should be devoted to the plaintiff. It is an accident of the particular suit that one of the defendants, Musammat Pawa, is the survivor of two ladies who executed a certain deed of endowment in favour of the plaintiff idol. This deed has been read to us. We understand it to mean that the temple was in existence and the plaintiff idol installed therein before the execution of this deed. In any case, therefore, the trust deed about which the parties are

* First Appeal No. 128 of 1922, from an order of Baijnath Das, District Judge of Budaun, dated the 20th of May, 1922.

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disputing must be distinguished from all those deeds by which a temple is directed to be built, or an idol to be installed therein. On the face of it, the deed is a gift in favour of the plaintiff idol, subject to this qualification, that the executants are to remain trustees and managers on behalf of the idol *qua* the trust property and are made responsible for seeing that the income of the property is devoted to the interests of the temple. Now the plaintiff alleges that, after the death of one of the two executants, the survivor, Musammat Pawa, has been induced to execute another deed in derogation of the rights which accrued to the idol under the original deed of endowment. He impleads various other defendants, on the allegation that they are concerned in the trespass committed upon the rights of the plaintiff idol under cover of the second deed executed by Musammat Pawa. The court of first instance framed two issues only. One of these was:—Is the suit cognizable by this court? The second was:—Is the suit barred by section 92 of the Code of Civil Procedure? So far as we can gather, the latter was the only question to which the trial court directed its mind, for there is nothing in the frame of the suit to suggest that it is one outside the cognizance of the trial court, unless it be barred by the second clause of section 92 of the Code of Civil Procedure. The first court found that it was so barred and dismissed the suit altogether. The lower appellate court has reversed this finding and remanded the suit for further trial upon the merits. Subject to one remark, which we shall have to make, we think the order of the lower appellate court was clearly right. On the wording of the trust deed, and independently of any evidence as to what worship is actually conducted and what charities, if any, dispensed at the temple of Shibji Maharaj in Agra, we should hesitate to hold that the deed of endowment, which has been read to us, was one creating a trust for public purposes, whether of a charitable or of a religious nature. This, however, is a point on which further light might perhaps be thrown by evidence hereafter to be produced.

Apart altogether from this question, the suit, as filed, is simply one by an idol in his juristic capacity against persons who are interfering unlawfully with his property or with his income. Such a suit has nothing to do with section 92 of the Code of Civil Procedure. There was, however, a question raised in the pleadings about which no specific issue was

framed, but which is discussed, in an incidental manner, in the judgment of the lower appellate court. The defendants did undoubtedly challenge the competence of Swami Lachhmi Nand to act as the guardian or legal representative of the plaintiff idol for the purposes of this suit. All we wish to say is that there must be an issue on this point and it must be determined. The plaintiff claims, as we understand, to be entitled to represent the idol because he is the priest of the temple, independently altogether of the endowment made in favour of the idol by the original trust deed on which the claim is based. He says also that he looks after the management of the temple, by which we presume him to mean that he conducts the worship there and dispenses such charities, if any, as are customary at this particular shrine. If this is what the plaintiff means, then this allegation does set up *prima facie* a case entitling Swami Lachhmi Nand to bring this suit as the next friend of the idol. The fact that he is not the manager or trustee under the particular deed of endowment which he desires to set up for the benefit of the aforesaid idol, would not prevent him from having a right to act on behalf of the idol in this litigation, if he occupied a position of manager or trustee *qua* the performance of those ceremonies of worship or charities for the benefit of which the trust moneys were directed to be applied. It will, however, be for the trial court to fix an issue on this point and to determine it after evidence has been taken. There is, in the judgment of the lower appellate court, a suggestion that an idol, who is being defrauded by his lawful guardian or trustee, might be treated by a court of law on the footing of an infant, and that any person claiming a benevolent interest in the fortunes of the said idol, would be permitted to maintain a suit in the name and as the next friend of the injured idol. We think it sufficient to say that we should not be prepared to affirm this as a correct proposition of law. It will be for Swami Lachhmi Nand to make out that he has a right to act on behalf of the plaintiff idol, otherwise the suit will fail on the mere ground that the plaintiff, considered as a juristic personality, is not legally before the court. Subject to these remarks, we dismiss this appeal. As we think that the defendants should have submitted to the order of remand on the ground on which it has proceeded, we leave them to bear the costs of this Court.

Appeal dismissed.

REVISIONAL CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

1922 Nov., 15.

CHHAKKAN LAL (DEFENDANT) v. KANHAIYA LAL (PLAINTIFF).*

Act No. VII of 1870 (Court Fees Act), schedule I, article 1—Set-off—Amount claimed as set-off in excess of plaintiff's claim—Court fee—Order refusing time to defendant to make good deficiency—Revision.

In reply to a suit for the recovery of money due on a mortgage, the defendant pleaded a set-off of an amount larger than that claimed and in effect asked for a decree against the plaintiff for the difference. He paid a court fee on the excess of his claim over the plaintiff's. The court, however, held that he was bound to pay court fees on the whole sum and not merely on the excess, and, refusing an adjournment to allow the defendant time to make good the deficiency, declined to go into the question of set-off.

Held that the order of the court below refusing to give the defendant time was not a fit subject for revision. *Buddhu Lal* v. *Mewa Ram* (1), referred to.

Held also that the order requiring the defendant to pay a court fee on the full amount of the set-off claimed was a good order, regard being had to the first article of the first schedule to the Court Fees Act, 1870.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Narain Prasad Asthana*, for the applicant.

Babu *Lalit Mohan Banerji*, for the opposite party.

PIGGOTT and WALSH, JJ. :—This is an application in revision of a somewhat peculiar nature. We do not wish to go into unessential facts, but the following facts require to be noted. On the 4th of January, 1921, a plaint was filed, ostensibly on a simple mortgage. The claim was for a large sum in excess of Rs. 20,000. On the 13th of July, 1921, one of the defendants filed a written statement, a lengthy document, raising a large number of pleas. It was, however, an important part of the defendant's case that, by reason of certain facts stated by him, the plaintiff had become liable to him in damages for a sum which actually exceeded the amount of the claim. In the written statement the amount of this excess was put at Rs. 415, and, undoubtedly, the defendant Chhakkan Lal asked for a decree in his favour for this amount. He offered, further, to pay additional court fees if it should be found that a larger sum was due to him; but he contended all along that he was only liable to pay an *ad valorem* court fee on such sum as might be found due to him in excess of the sum due to the plaintiff on the mortgage transaction which was the basis of the suit. The trial court fixed a number of issues on the 22nd of July, 1921, and the third of these issues raised the point whether the defendant,

* Civil Revision No. 66 of 1922.

(1) (1921) I. L. R., 43 All., 564.

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Chhakkan Lal, was not bound to pay an *ad valorem* court fee on the entire sum claimed by him as damages, before this portion of his defence could be entered into. For reasons which we need not consider, the case was set down for hearing on the 25th of January, 1922, and following days. After arguments had been heard on the 25th of January, 1922, the trial court pronounced judgment on the first three issues in the case, and, on the third issue, found against the defendant, Chhakkan Lal. It held that he was not entitled to have his claim for damages inquired into and determined in this trial, unless he first paid an *ad valorem* court fee on the entire amount claimed as damages in his written statement. On this the said defendant asked the court to adjourn the hearing of the suit and to give him a month in which to pay the additional court fee required. The court refused to adjourn and, no doubt, by the terms of its order, implied that it would not now receive the court fee in question if it should be tendered at any future date. We must note, however, that this question has not been brought to a direct issue, because the defendant made no attempt to tender the amount of the court fee in question, but came up to this Court in revision against the court's order of the 25th of January, 1922. Now, in its actual effect, that order is no more than an order refusing to adjourn the hearing of a pending suit. No doubt the opinion is implied that Chhakkan Lal, defendant, will not be allowed, on any future date, to make up the deficiency in the court fee on his written statement; but, as we have remarked above, that particular point was not brought to a direct issue by the tendering of the court fee required. We found it necessary to hear arguments in the course of which the merits of the dispute were laid before us, because it was impossible for us to determine the question whether the application really fell within the purview of the revisional jurisdiction of this Court, until we had been put completely in possession of the facts. We feel bound to hold, however, that the order complained of is not one against which an application in revision lies. We are bound to follow the principle laid down by the Full Bench in the case of *Buddhu Lal* v. *Mewa Ram* (1) and, certainly, the record now before us is not the record of a case which has been decided. We propose to dismiss the application on this ground alone; but having heard so much in the way of argument, we think it is just as well that we should add the

(1) (1921) I. L. R., 43 All., 864.

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following three remarks. We pronounce no opinion one way or the other on the propriety of the trial court's refusal to adjourn the hearing of the suit on the 26th of January, 1922. Secondly, we are of opinion that the order requiring the defendant to pay an *ad valorem* court fee on the full amount of the damages claimed in his written statement was a good order, regard being had to the first article of the first schedule to the Court Fees Act. It must be borne in mind that this article was amended at the time of the enactment of the present Code of Civil Procedure, Act V of 1908, and that rulings prior to the date of the said amendment must be very cautiously used. Finally, we think it only fair to the defendant Chhakkan Lal and to the parties to say that, if at any time when this suit is actually pending in the court below, and that court is still seised of the entire case, the defendant Chhakkan Lal comes into court and tenders for the acceptance of the court the amount of the court fees necessary in order that his written statement may be properly stamped according to law, it seems to us a matter for very serious consideration by the trial court whether that court would have justification to refuse to accept those court fees. With these remarks we dismiss the application with costs.

Application dismissed.

APPELLATE CIVIL.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

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Nov., 15.

NUR MUHAMMAD (DEFENDANT-APPELLANT) *v.* NATHWAR LAL AND OTHERS (PLAINTIFFS-RESPONDENTS).*

Parties—Non-joinder of necessary party—Duty of Court—Act No. XVI of 1908 (Indian Registration Act), section 17—Registration—Letter embodying terms of lease of immovable property—Suit for specific performance.

A court ought not to dismiss a suit merely upon the ground that a necessary party has not been impleaded, when it has before it an application by the plaintiff to join such party as a co-plaintiff, the party being willing thereto, and when such joinder would not operate in any way to the prejudice of the defendant.

The main terms of a proposed lease of immovable property were agreed upon and embodied in a letter, a counterpart of which was kept by each party. One of the parties sued the other for specific performance of the agreement to lease and treated the letter, not as evidence of an oral agreement, but as the contract itself.

Held that the letter required registration, and being unregistered could not be referred to.

THE facts of this case are fully set forth in the judgment of the Court.

* First Appeal No. 346 of 1919, from a decree of Govind Sarup Mathur, Subordinate Judge of Agra, dated the 19th of September, 1919.

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NUR MUHAMMAD VEERJIBHAI VEELMAHOMED v. NATHAN LAL.

Mr. *B. E. O'Conor* and Munshi *Narain Prasad Asthana*, for the appellant.

Babu *Lalit Mohan Banerji*, for the respondent.

MEARS, C. J., and BANERJI, J.:—This was a suit for specific performance brought in the name of Nur Muhammad Veerjibhai Veelmahomed, who asked for specific performance based upon a letter signed by the defendant, whereby, according to the plaintiff, the defendant agreed to lease to the plaintiff a bone-crushing factory at Agra. In the court of the Subordinate Judge one of the questions which arose was whether, assuming there to be a contract, it had been made with the plaintiff or with the plaintiff's father. [He] held the Subordinate Judge decided that the contract had been made with the plaintiff's father, and although there was an application by the plaintiff that the father should be joined as a co-plaintiff in order to get over any technical difficulty, and although it appeared that the father himself came from Bombay to the court to testify his willingness to become a plaintiff and signed an application which was made by a pleader so as to verify the statements made therein, the learned Subordinate Judge refused to allow the father to be joined, on the most narrow and technical ground that the father, Veerjibhai Veelmahomed, had not himself filed a petition to be made a plaintiff. It is true that the application of the son to join the father as co-plaintiff was made at a very late stage of the case, but it was not suggested that it would operate in any way to the prejudice of the defendant. In the absence of any such prejudice an application of this kind ought to have been granted. We disagree most strongly with the procedure adopted by Mr. Govind Sarup Mathur, because it is the manifest duty of a judge to try to put himself more for all, to all questions that can arise in relation to the transaction; and he, when the pleader had stated to him that the father had come from Bombay to his court, should at once have told the pleader to put the matter in order, by the father himself making an application, and that application should have been granted. In the particular circumstances of this case it so happens, however, that no injustice has been done; but that does not in the least detract from our view that where an amendment is necessary for the purposes of settling all matters in controversy and works no injustice, nor takes by surprise the opposite party, judges should make such amendments.

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EMPEROR v. DURGA PRASAD

Bank who were returning on an *ekka* from the Imperial Bank to the Allahabad Bank with over Rs. 30,000 worth of currency notes in their possession. They came up behind this *ekka* in a motor car which had been brought from Calcutta for the purpose. They stopped the motor car: two of their number got out, assaulted the servants of the Bank, robbed them of the notes in their possession and re-entered the motor car, which drove off at full speed. The number of persons taking part in this attack was more than five. Eventually the following persons were arrested and put upon their trial:—Budhai, Sheo Harakh, Manmath Nath Das, Durga Prasad, Sarabjit and Musammat Sundari. One of the dacoits, Kashi Prasad, was tendered a pardon and gave evidence for the Crown. Budhai, Sheo Harakh, Manmath Nath Das and Durga Prasad were tried for the actual commission of the dacoity. Sarabjit was tried under a charge under section 412 of the Indian Penal Code, to the effect that the day after the dacoity he was found in dishonest possession of certain of the stolen notes, knowing that they had been stolen in the dacoity of the previous day. Sarabjit, it is to be noted, is the brother of one Budhai who, on the evidence, took part in the dacoity. Musammat Sundari was charged with being in possession of notes stolen in the dacoity. She was in the motor car when the police overtook it. The jury found Budhai, Sheo Harakh, Manmath Nath Das and Durga Prasad guilty of dacoity and Sarabjit and Musammat Sundari guilty on charges under section 412 of the Indian Penal Code. Sheo Harakh has already appealed against his conviction and sentence. His appeal has been dismissed.

I take first the appeals of Sarabjit and Budhai. Their learned counsel has raised the following questions of law. The first is that the trial is bad in law because Sarabjit and Sundari could not be tried jointly with the remaining four accused persons. Now, it is always for the prosecution to justify a joint trial. A separate trial is the rule and a joint trial is the exception. In the circumstances of this case, however, a joint trial was permissible under the provisions of section 239, Code of Criminal Procedure, for upon the evidence the offence of dacoity and the two offences of dishonest possession of stolen property knowing it to have been stolen in the commission of a dacoity, or dishonest reception of such property, knowing it to be stolen, from a known dacoit, were committed in the same transaction. The view which I take is the

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view which was taken by a Bench of the Bombay High Court in *Emperor* v. *Balabhai Hargovind* (1). This is not a case of separate charges of receiving stolen property, each in itself forming a separate transaction and unlinked by something which brings them into the same transaction. If Sarabjit and Sundari had been tried jointly by themselves, their trial would have been bad in law, but the circumstance that they were tried with persons charged with the dacoity in which the property was stolen links up all the three charges into one transaction. This is the view which has been taken by the Bombay High Court and it is the view which commends itself to me. The jury had before them evidence which justified the conclusion that both Sarabjit and Sundari each took possession of stolen notes, stolen in the dacoity, with full knowledge that they had been stolen in that manner. Their verdict shows that they believed that evidence. I, therefore, find that the joint trial was a good trial in law.

The second point taken on behalf of Sarabjit and Budhai is that the learned Judge's summing up was bad in law. I find against this plea. I have been through the summing up and the evidence in the case and I consider not only that the summing up cannot be attacked in any way as disclosing any illegality or any irregularity, but I further consider that the summing up is an admirable summing up and a model of what a summing up should be. It is clear and succinct, absolutely fair, and presents both the law and the facts to the jury in a manner on which it would be difficult to improve.

The last point is taken by all the appellants together and can be considered for all of them. It is the only point which has been pleaded in respect of Durga Prasad and it is the only point that can be pleaded in respect of Manmath Nath Das who has appealed from jail. This point is that the sentence on each individual is too severe. I do not consider the sentence severe in the case of any individual. The offences committed were very serious offences and it is absolutely necessary that persons committing such offences should be made to recognize the enormity of what they have done, by the passing of salutary sentences. I do not consider that the learned Sessions Judge has, in any instance, passed too severe a sentence. I, therefore, dismiss these appeals.

Appeals dismissed.

(1) (1904) 6 Bom., L. R., 617.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Piggott.

1923 Nov., 17.

EMPEROR v. HAR PRASAD BHARGAVA.*

Criminal Procedure Code, section 337—Accomplice—Admissibility of evidence given by accomplice, but not under the provisions of section 337.

The Government of the Central Provinces, having before it the case of a subordinate judge who was suspected of receiving bribes, issued a notification to the effect that no prosecution would be instituted by Government against any person who came forward with evidence that he had paid or offered a bribe to the particular officer whose case was under consideration. In consequence of this notification, two persons came forward and gave evidence against the subordinate judge, being undoubtedly accomplices as regards the offence with which the accused was charged.

Held that, whatever effect the circumstances under which the witnesses' evidence was given might have upon its credibility, there could be no objection to its admissibility. It is not necessary, in order to make an accomplice a competent witness, that the procedure prescribed by section 337 of the Code of Criminal Procedure should be invariably made use of. *Mohesh Chunder Kopali* v. *Mohesh Chunder Basu* (1), *Queen-Empress* v. *Tirkoni Sahai* (2), *Banu Singh* v. *Emperor* (3) and *Queen-Empress* v. *Mona Puna* (4), referred to.

THE facts of this case, so far as they are necessary for the purpose of this report, are fully stated in the judgment of the Court.

Babu *Lalit Mohan Banerji* (Government Advocate), for the Crown.

Mr. *C. C. Dillon*, Mr. *G. W. Dillon*, Pandit *Mangal Prasad Bhargava* and Munshi *Durga Prasad*, for the accused.

MEARS, C. J. and PIGGOTT, J. :—[After discussing the facts, their Lordships proceeded.] Two of the pleas left undetermined are against the jurisdiction of the trial court, others impeach the admissibility of the most material evidence in the case, while others again raise questions of law as to the manner in which the testimony of Bhagirath and Mangal Chand should be regarded, in view of the admitted fact that they are in the position of accomplices in the commission of the offence charged. Now it is clearly illogical that a verdict of acquittal should be recorded as the ultimate result of a trial in respect of which it has not been finally determined that it was held before a court of competent jurisdiction. It must also be exceedingly difficult for any Judge to arrive at a correct appreciation of the value of certain evidence, if he enters on the task while the back of his mind is still preoccupied with a doubt whether that evidence ought to have been admitted on to the record. We cannot help wondering

* Criminal Appeal No. 497 of 1922, by the Local Government of the Central Provinces, from an order of Prem Narain, Sessions Judge of Akola, dated the 6th of March, 1922.

(1) (1882) 10 C. L. R., 553.
(2) (1898) I. L. R., 20 All., 426.
(3) (1906) I. L. R., 33 Calc., 1353.
(4) (1892) I. L. R., 16 Bom., 661.

whether a certain sub-conscious pre occupation of the judicial mind with a set of legal conundrums, which the learned Sessions Judge was not anxious to solve, may not have contributed to the unsatisfactory manner in which he has handled the evidence and the erroneous conclusion he has drawn from it. The question of jurisdiction has not been and could not be seriously argued before us. The sanction of the Local Government of the Central Provinces, reproduced at page 5 of our printed books, was quite sufficient to remove the bar imposed by section 197 (1) of the Code of Criminal Procedure to the cognizance of the alleged offence by any court of otherwise competent jurisdiction. Under section 177 of the same Code the proper place for the trial was Akola, in the absence of any order expressly transferring the case for trial to some other Sessions Division. The Magistrate, Khan Bahadur E. Jacob, was duly invested with territorial jurisdiction at Akola and the case was properly instituted in his court. The record before us does not explain why one complaint was filed before the said Magistrate, at Nagpur, on the 28th of October, 1921, and a further complaint, at Akola, on the 7th of November, 1921, but this procedure could not have the effect of ousting his jurisdiction. Questions regarding the admissibility of evidence should ordinarily be raised at the time when such evidence is tendered. In the trial court the witness Bhagirath was examined on the 12th of November, 1921, and cross-examined on the 2nd of December, 1921. The witness Mangal Chand was examined on the 13th of November, 1921, further examined on the 14th of November, 1921, and cross-examined on the 2nd of December, 1921. The accused was twice examined by the court and put in a written statement in his defence on the 15th of December, 1921. Even this statement contains no express plea against the admissibility of the evidence of these two witnesses. It is only from the judgment of Khan Bahadur Jacob that we gather that it was argued before him that "as Mangal Chand and Bhagirath had not been pardoned under section 337 of the Criminal Procedure Code, nor had the prosecution against them been withdrawn, they were not competent witnesses." In the memorandum of appeal to the Sessions Court there is a plea that "the evidence obtained" by means of "the undertaking on the part of the Local Government otherwise described as amnesty," not only "has no value," but "is inadmissible"; there are also

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pleas against the admissibility of "the entries in the account books of Bhagirath and Mangal Chand's master," as also of the memorandum, Exhibit P. III, handed by Bhagirath to the investigating Police Officer, and the entry containing the numbers of the currency notes in Bhagirath's notebook, Exhibit P. V. There is a general plea that the trial court admitted and recorded "irrelevant and inadmissible evidence both documentary and oral, in spite of objections" and reserved its decision on the same. It has not been shown to us, and is not apparent from our examination of the record, that the question of the competence of Bhagirath and Mangal Chand to give any evidence at all was raised in the trial court at the proper time, that is, when the witnesses were tendered for examination. The Magistrate purported to deal with it as an argument addressed to him when the defence finally summed up their case. It was no doubt open to him to consider, even at that stage, whether he had not made a mistake in examining Bhagirath and Mangal Chand at all. This he has done and has held that the men were competent witnesses. The Sessions Judge has not decided the question at all. The argument addressed to us on the point, when properly analysed, seems to involve three distinct propositions:—

(i) That Bhagirath and Mangal Chand being, on their own testimony, accomplices in the commission of the offence to which they deposed, could not be examined as witnesses against the accused, because the case did not fall under the provisions of section 337 of the Code of Criminal Procedure, and there is no other section of that Code under which "the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, the offence under inquiry" can be taken at all.

(ii) That Bhagirath and Mangal Chand were not merely accomplices but were, by reason of the complaint filed in the court of Khan Bahadur E. Jacob, "accused persons" along with Har Prasad Bhargava, and under section 5 of the Indian Oaths Act, No. X of 1873, it is not lawful to administer "an oath or affirmation to the accused person." In this connection it was suggested that the proper course for the Magistrate to have followed would have been to issue process against these men, along with Har Prasad Bhargava, and for the Local Government to "withdraw from the prosecution" of these two persons under section 494 of the Criminal Procedure Code.

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(iii) That the evidence of Bhagirath and Mangal Chand was obtained after the Government of the Central Provinces had issued, and caused to be published, a declaration that no prosecution would be instituted by the said Government against any person who came forward with evidence that he had paid or offered a bribe to Har Prasad Bhargava; that the issue of such a declaration was "illegal," and that no evidence obtained in consequence, or tendered on the strength of such a declaration, was legally admissible.

Now, the first of these contentions rests upon an obvious fallacy. This fallacy is almost sufficiently exposed by the very terms of the second contention, but it reappears, in substance, as the only arguable basis for the third contention. Section 337 of the Code of Criminal Procedure empowers certain courts of justice, namely, Magistrates exercising certain powers, or specially empowered *ad hoc* by an order of sanction, to pass a judicial order, the effect of which is that a "person supposed to have been directly or indirectly concerned in, or privy to, the offence under inquiry," who chooses to accept the pardon tendered by the said order, can give his evidence "as a witness in the case," with the knowledge and assurance that the order will operate as a bar to his own subsequent prosecution or trial for the offence in respect of which the pardon was so tendered, or for any other offence of which he appears to have been guilty in connection with the same matter. Under certain circumstances set forth in section 339, the order tendering the pardon may cease to have this effect, but this will only be when it has been superseded by a judicial finding that the pardon has been forfeited. The points to be noticed are that section 337 is an empowering section, that it is addressed to certain courts of justice, and has nothing to do with the powers or discretion of an executive authority, such as a Local Government, in the matter of instituting, or refraining from instituting, any prosecution, and that the legislature has seen fit to limit its operation to "the case of any offence triable exclusively by the Court of Session or High Court." We are dealing here with the case of an offence punishable under section 161 of the Indian Penal Code, which is triable by the "Court of Session, Presidency Magistrate or Magistrate of the First Class." Admittedly, section 337 of the Criminal Procedure Code has no application to the case now before us. The result is that no court of justice had any authority to pass, in favour of Bhagirath or Mangal Chand, any order

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which either of them could plead as a bar to his own subsequent prosecution, were such prosecution to be instituted. If they chose to come forward and give evidence without the protection of any such judicial order, that was their own look-out. There is no provision of Indian statute law, nor is there any principle of natural justice, which makes an accomplice, as such, an incompetent witness at the trial of another person in respect of the offence in the commission of which he was an accomplice. The prosecution is not evading the provisions of section 337 of the Criminal Procedure Code when it puts into the witness-box an accomplice in the commission of an offence to which that section does not apply. The practical difficulty in such a case is for the prosecution to feel any confidence that an accomplice will give true evidence. The trial court is undoubtedly entitled to inquire into any measures which those responsible for the conduct of the prosecution may have taken to overcome this difficulty. It will carefully consider the question what bearing the evidence as to the measures so taken in a particular case may have on the credibility of the accomplice witness concerned, on the value to be attached to his testimony. A refusal to admit his evidence on the record, merely because he was an accomplice and because the case was one outside the purview of section 337 of the Criminal Procedure Code, would be a clear error of law.

This is made all the more obvious by the second of the contentions addressed to us on behalf of the accused. We are not disposed to repel the contention that the Magistrate would have been within his jurisdiction if, on the complaint laid before him, he had caused process to issue against Bhagirath and Mangal Chand as well as against Har Prasad Bhargava. These persons would then have come before the Magistrate as co-accused in the same case. The Magistrate could still, in his discretion, have proceeded to try the three accused either jointly or separately. The words "as the court thinks fit" in section 239 of the Criminal Procedure Code are of the widest possible import. It is to be presumed that the court will "think fit" to adopt, in each particular case, whichever course it regards as most conducive to the ends of justice. We are not concerned to decide a point which has not arisen, but we must certainly not be understood to hold that if the Magistrate, after issuing process against Har Prasad Bhargava, Bhagirath and Mangal Chand, had thought fit to try Har

Prasad Bhargava first, the other two would thereby have become incompetent witnesses, at his trial, whether for the prosecution or for the defence. If he had elected to enter upon a joint trial, the Public Prosecutor could, with the consent of the court, have withdrawn from the prosecution of Bhagirath and Mangal Chand. Beyond question, these two could then have been put into the witness-box against Har Prasad Bhargava. No one would even have suggested that, after an order of discharge or acquittal had been passed in respect of them, either of them continued to occupy the position of "the accused person" within the meaning of section 5 of the Indian Oaths Act (No. X of 1873). From a legal point of view the only difference in the case now before us is that neither Bhagirath nor Mangal Chand was ever an "accused person" at the trial in which his evidence was tendered, within the meaning of the said section. The real effect of the argument addressed to us on behalf of the accused on this point is that there is a method by which the prosecution, keeping strictly within the four corners of the Code of Criminal Procedure, might, with the consent of the court, have put Bhagirath and Mangal Chand into the witness-box against Har Prasad Bhargava, each of them fortified by a judicial order of acquittal which would have barred their subsequent prosecution. They actually gave evidence without any such shield, though relying upon an extra-judicial undertaking that the Local Government would not direct their prosecution. Whether their testimony is entitled to greater or less credit on this account is a question to be considered; but it has nothing to do with the admissibility of the testimony. There is abundant case-law in support of the propositions which we have laid down. In *Mohesh Chunder Kopali* v. *Mohesh Chunder Dass* (1) principles were laid down which would, beyond all question, make Bhagirath and Mangal Chand competent witnesses for the defence, if the present accused had sought to produce them as such at his trial. The same is the effect of the decision in *Queen-Empress* v. *Tirbeni Sahai* (2). In a very old case which has never, so far as we know, been dissented from but was quoted with approval by a Bench of the Calcutta High Court in 1906 [*vide Banu Singh* v. *Emperor* (3)]—we refer to the case of *Queen* v. *Behary Lall Bose* (4)—it was contended that the evidence of

(1) (1882) 10 C. L. R., 568.
(2) (1898) I. L. R., 20 All., 426.
(3) (1906) I. L. R., 33 Calc., 1353.
(4) (1867) 7 W. R. (Cr. R.), 44.

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a certain witness for the prosecution was inadmissible "because he had been, at one time, charged before the Magistrate as an accomplice and had neither been acquitted nor pardoned." The High Court repelled this contention and held that "there is no law or principle which prevents a person, who has been suspected or charged with an offence, but discharged by the Magistrate for want of evidence, being afterwards admitted as a witness for the prosecution." An even stronger case is that of *Queen-Empress* v. *Mona Puna* (1). The accused was on his trial on a charge of burglary, and the police tendered in evidence against him a man whom they had previously arrested on suspicion of complicity in the same offence. The Court was of opinion that the police had acted improperly in releasing this man, but nevertheless held him to be a competent witness for the prosecution. It was laid down that "the accused" in section 342 of the Criminal Procedure Code means "a person over whom the Magistrate or other court is exercising jurisdiction," and reference was made to the provisions of section 118 of the Indian Evidence Act (No. I of 1872). The whole of the argument applies *a fortiori* to the facts of the present case and to the contention founded upon section 5 of the Indian Oaths Act (No. X of 1873). Two cases have been quoted on the other side. In *Empress of India* v. *Asghar Ali* (2), the facts were so different that we cannot treat any of the remarks incidentally made by the learned Judges as laying down principles applicable to the facts now before us. There had been, in that case, a breach of the clear provisions of section 337 of the Code of Criminal Procedure and it was difficult to see how the High Court could deal with the testimony of a witness tendered in contravention of those provisions otherwise than by rejecting it altogether. We were referred also to a case decided at Lahore, *Mahandu* v. *King-Emperor* (3). We think it sufficient to say that, in so far as the principles laid down in that case seem to us inconsistent with those in *Queen-Empress* v. *Mona Puna* (1), we are in agreement with the latter.

In what has already been said, we have, in substance, anticipated the third contention on this point pressed upon us on behalf of the accused. In a case to which we referred above, that of *Banu Singh* v. *Emperor* (4), the learned Judges

(1) (1892) I. L. R., 16 Bom., 661.
(2) (1879) I. L. R., 2 All., 260.
(3) (1919) 21 Crim., L. J. R., 699; 57 Indian Cases. 167.
(4) (1906) I. L. R., 33 Calc., 1353.

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held that a Local Government in India has no power to tender a conditional pardon to an accomplice for the purpose of his being examined as a competent witness against others accused with him. If this pronouncement only means that the Legislature in India has provided no method, outside the scope of section 337 or section 494 of the Criminal Procedure Code, by which a Local Government can provide an accomplice witness with a judicial order which he can subsequently plead in bar of his own prosecution, should such prosecution be instituted, it is undoubtedly correct. It seems to us obvious, at the same time, that a discretion to refrain from instituting a prosecution, in any particular case, is inherent in any authority to which the law has entrusted the power to institute a prosecution. Nor can any law prevent a person, or body of persons, exercising such authority from determining beforehand how that discretion shall be exercised upon the happening of a certain contingent event. If such determination is communicated beforehand to any person or body of persons whom it may concern, we can find no provision in the Indian statute law which lays down that the competence of such person or persons to testify as witnesses in a criminal court about any matter referred to in such communication is thereby affected. As regards the point actually decided in *Banu Singh* v. *Emperor* (1), we are not concerned to say whether or not we should have passed the same order upon the facts then before the Calcutta High Court; they are sufficiently distinguishable from the facts of the present case. We are brought back to the conclusion which we have already indicated. The Government of the Central Provinces could undoubtedly have elected to follow a different procedure. They might have instituted a prosecution against Bhagirath and Mangal Chand and have withdrawn the same under section 494 of the Code of Criminal Procedure. If this had been done before framing a charge, the resulting judicial order would have been one of discharge; if it could conceivably have been done after a charge had been framed, an order of acquittal would have followed, pleadable under the provisions of section 403 of the Criminal Procedure Code in bar of any subsequent prosecution. The question whether the testimony of Bhagirath and Mangal Chand would have been entitled to more credit if they had given their evidence after such order of

(1) (1906) I. L. R., 33 Calc., 1368.

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discharge or acquittal in their favour, is one which, as we have already said, has nothing to do with that of their competence to testify. In appraising their evidence we bear in mind that it was given in reliance upon a promise made on behalf of the Local Government that no prosecution would be instituted against them in respect of the offence to the commission of which they testified.

The admissibility of certain documentary evidence produced by Bhagirath and Mangal Chand was challenged in the memorandum of appeal to the Sessions Court, upon certain grounds independent of the general question of the competence of these witnesses to testify at all. Little was said in argument before us in support of these contention , but it is well that we should deal with them. We are satisfied that the account books of the firm of which Bhagirath is a member, and those of the firm of which Mangal Chand is a servant, which were produced in corroboration of their testimony, are books properly kept in the regular course of business; the relevant entries in the same are admissible in evidence for the purpose for which they have been used.

Two documents, Exhibits P. III and P. V, were put in evidence in connection with Bhagirath's deposition in order to corroborate his assertion that he had used twelve currency notes of one hundred rupees each, bearing specified numbers, in order to make up the amount of the bribe paid by him. It was certainly open to the prosecution to lead evidence to prove that Bhagirath had made out a list of these twelve notes, specifying the said notes in detail, and had communicated that list to other persons at a time when he could not possibly know that those particular notes had been found in the possession of Har Prasad Bhargava on the night between the 19th and 20th of September, 1921. If Bhagirath is a competent witness at all, he was undoubtedly entitled to produce the memorandum in the book Exhibit P. V and to depose that it was in existence twenty two days before the 26th of October, 1921, on which date it was for the first time ascertained what were the numbers of the notes recovered from Har Prasad Bhargava on the night between the 19th and 20th of September.

We set aside the order of acquittal and, under section 423 (1) (a) of the Code of Criminal Procedure, we find Har Prasad Bhargava guilty of the offence with which he was charged

and pass upon him the same sentence which was passed by Khan Bahadur Jacob, on the 4th of January, 1922, namely, 2½ years' rigorous imprisonment and a fine of fifteen thousand rupees. We also confirm the order regarding the disposal of the notes and the exhibits in the case. This order will be certified to the Court of Sessions, at Akola, in order that Har Prasad Bhargava may be required to surrender to his bail and the sentence be carried out according to law.

Appeal allowed.

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APPELLATE CIVIL.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Lindsay.

LACHMI NARAIN AND OTHERS (PLAINTIFFS) *v.* BOMBAY, BARODA AND CENTRAL INDIA RAILWAY COMPANY (DEFENDANTS).* 1923 *Nov.*, 20.

Act No. IX of 1872 (Indian Contract Act), section 149—Bailor and bailee—Railway Company—Delivery of goods to bailee.

Certain goods were brought to a railway station for despatch and a forwarding note was presented to the loading clerk, who marked a number on it. The clerk then told the person who tendered the forwarding note to come the next day for the receipt and have a number put on the goods corresponding to the forwarding note. Meanwhile the goods were deposited in a tin shed, where it was the custom to leave goods in similar circumstances, under the custody of the owners. A number corresponding to the number of the forwarding note was marked on the goods, but not by any railway official. That night the goods were stolen.

Held that the railway company was not liable, as the goods had not been delivered to it within the meaning of section 149 of the Indian Contract Act, 1872.

THE facts of this case sufficiently appear from the judgment of the Court.

Maulvi *Iqbal Ahmad* and Maulvi *Muhammad Abdul Aziz*, for the appellants.

Pandit *Ladli Prasad Zutshi*, for the respondents.

MUHAMMAD RAFIQ and LINDSAY, JJ.:—This appeal arises out of a suit brought by the plaintiffs appellants for the recovery of damages, on the allegation that they had made over certain goods for despatch to the respondent company and that by the neglect of the latter the goods had been lost.

One of the objections taken to the suit was that no delivery of the alleged lost goods had been made to the respondent company.

Both parties gave evidence. The court of first instance was of opinion that the goods had not been delivered to the

* Second Appeal No. 1416 of 1921, from a decree of K. A. H. Sams, District Judge of Aligarh, dated the 2nd of August, 1921, confirming a decree of S. M. Mir, Munsif of Hathras, dated the 6th of May, 1921.

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railway company and therefore no claim for damages could be maintained against them. The claim was accordingly dismissed

On appeal the decree of the first court was affirmed.

The plaintiffs came up in second appeal to this Court and the case was heard first by a Bench of this Court on the 19th of July, 1922. On that date an argument was advanced on behalf of the plaintiffs appellants that some important evidence in the possession of the respondent company, though required by the plaintiffs appellants and summoned at their instance, had not been produced and tendered by the respondent company. By an order dated the 19th of July, 1922, the Bench hearing the appeal adjourned the case with a direction to the respondent company to produce certain documents. One of the railway clerks has been produced today with two documents and has been examined. The documents that he has produced are called the tally book and the receipt register, which is really a file of receipts.

The contention on behalf of the plaintiffs appellants is that they sent one large package containing cloth to the railway station at Hathras for despatch to Farrukhabad on the 23rd of December, 1919. One Maharaj Kishore, a servant of the broker, approached the Goods office clerk of the Hathras railway station with a request that the said package be accepted for despatch to Farrukhabad. Brij Bihari Lal, the loading clerk, filled up a number in the forwarding note presented by Maharaj Kishore. The number was 675. The forwarding note was returned to Maharaj Kishore with a request to call the next day and have the package marked with the number entered in the forwarding note, and obtain a railway receipt. The package in question, it seems, was not brought to the railway station by Maharaj Kishore but sent there by the plaintiffs and deposited in a tin shed within the premises of the railway station. According to Maharaj Kishore, those goods which the railway authorities do not accept are deposited in a tin shed within the premises of the railway station and are watched by a man appointed by the owner of the goods. Maharaj Kishore, without waiting till the next day, got the contractor's man to put the number 675 on the package. During the night of the 23rd of December, 1919, the package in question was stolen. The next morning a formal

report was made to the railway police who took up the investigation at once. Twelve pieces of cloth and the covering, commonly known as "bardana," were discovered by the wire fencing of the station compound. The other pieces were never traced. According to the Sub-Inspector, the "bardana" bore the number 675. The position taken up by the plaintiffs appellants is that the giving of the number 675 by the loading clerk was sufficient to amount to the registration of the goods offered and to the delivery of the goods. We think that on the evidence of Maharaj Kishore the plaintiffs appellants have no case. The mere fact that the loading clerk filled up what is called the serial number in the forwarding note, without doing anything further, would not amount to the delivery of goods to the railway by the consignor. Section 149 of the Contract Act defines delivery of goods in the case of bailees. It is as follows:—"The delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorized to hold them on his behalf."

On the evidence in the present case we are unable to find that anything was done by the plaintiffs consignors which would amount to putting the goods in question in the possession of the railway or any person authorized on behalf of the railway. The appeal therefore fails and is dismissed with costs.

Appeal dismissed.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Lindsay.

SURWAN PRASAD TIWARI AND ANOTHER (PLAINTIFFS) *v.* BASDEO NARAIN SINGH AND OTHERS (DEFENDANTS).*

1922 *November*, 20.

Pre-emption—"Arazidars"—*Distinction between "arazidars" and co-sharers.*

Held that the particular class of proprietor called in the district of Gorakhpur an *arazidar* is not a co-sharer and will not therefore come within the provisions of a *wajib-ul-arz* relating to the pre-emptive rights of co-sharers. *Unrao Kunwari* v. *Jarbandhan* (1) and *Mahadeo Prasad* v. *Jagar Deo Sir* (2), referred to.

THE facts of the case sufficiently appear from judgment of the Court.

Dr. *M. L. Agarwala* and Pandit *Lakshmi Narain Tiwari*, for the appellants.

* First Appeal No. 291 of 1920, from a decree of Muhammad Zia-ul Hasan, Additional Subordinate Judge of Gorakhpur, dated the 20th of March, 1920.

(1) (1906) I. L. R., 30 All., 479.
(2) (1916) I. L. R., 38 All., 260.

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Munshi *Harihans Sahai*, Munshi *Harnandan Prasad* and Munshi *Surendra Nath Varma*, for the respondents.

MUHAMMAD RAFIQ and LINDSAY, JJ. :—The question we have to decide in these two appeals, in both of which the same parties are appellants, is whether or not they had a right of pre-emption according to custom.

The court below has dismissed the claim of the plaintiffs, holding that, on their status as disclosed by the evidence, they are not entitled to pre-empt

The property which was sold, and in respect of which pre-emption was sought, is situated in a village called Dudhi, in the pargana of Sidhua Jobna, in the Padrauna tahsil of the Gorakhpur district.

The lower court held that as the plaintiffs admitted themselves to be what are called *arazidars* and as they are so called in the village papers, they had no right of pre-emption, and for this purpose the learned Subordinate Judge relied upon a Full Bench ruling of this Court in *Uman Kunwari* v. *Jarbandhan* (1). If that ruling applies to the case which is now before us, then there can be no question that the decision of the lower court is correct, but Dr. *Agarwala*, who has addressed a very learned and able argument to us on behalf of the appellants, has asked us not to decide the case merely upon the dictum contained in the judgment to which we have just referred and has asked us to deal with the case after an examination of the real position of these plaintiffs in the village in question.

So far as the Full Bench ruling is concerned, it certainly lays down that persons who are called *arazidars* are not members of the co-parcenary body and are not entitled to pre-empt. The judgment on this point is a very short one and is not supported by much in the way of reasoning. The learned Judges, before whom the case was up, stated that it did not clearly appear what the nature of *arazidari* land was, but after reference to various settlement reports, they found that *arazidars* were not treated as members of the co-parcenary body.

The expression *arazidar* has been defined in the settlement report of the Gorakhpur district prepared by Mr. Cruickshank and published in 1891. The earlier settlement of this district had been conducted by Mr. Dunsden, who was a well-known authority on all revenue matters. At paragraph 201, page 56,

(1) (1908) I. L. R., 30 All., 479.

of Mr. Cruickshank's report he refers to Mr. Lumsden's description of the people who are known as *arazidars*. We think it advisable to quote this passage in full. It is as follows :—

"In pargana Sidhua Jobna Mr Lumsden, at the last settlement, noted —In describing the tenures of this pargana mention of the immense number of *birt* and independent *arazi* holdings must not be omitted. These are small tracts of land situated in almost every village which were originally, in most cases, held rent free. They had their origin in that general transition of property into the hands of strangers which took place in this pargana in the early part of the present century and which has already been alluded to in describing the origin and past history of the principal talukdars. Weak and impoverished zamindars, anxious to have some one between them and the ruling power, voluntarily transferred their villages to one or other of the powerful talukdars who, at that time, gained a footing in the pargana, reserving only for themselves a small tract of land sufficient for their immediate subsistence. In the case of other villages which were forcibly usurped by the talukdars, the latter compromised matters so far as to allow the old proprietors to retain possession of certain defined parcels of land in their respective villages. In this way were created most of these *birt* and independent *arazidari* holdings which are so numerous in this pargana and which have been a source of infinite trouble to the settlement officer, both on account of the frequency of disputes regarding their exact limits and the difficulty of apportioning to each its fair quota of the Government demand. The proprietors of these parcels of land hold and manage independently of the village zamindar, the latter in the case of *birt arazidars* only receiving a *malikana* allowance calculated at 10 per cent over the revenue *jama*."

We have already adverted to the fact that the property with which we are now concerned is situate in this pargana of Sidhua Jobna referred to in Mr. Lumsden's definition.

We may also refer to another paragraph of this same settlement report, namely, paragraph 187, at p. 52. There the settlement officer quotes a definition by Mr. Reid who had been the Settlement Officer of Azamgarh—a definition of the term *arazidars*.

Mr. Reid defined the term *arazi* as "plots of land which, though included within the area of *mauzas* and *mahals*, are held on a distinct tenure from, and convey no title to rights or interests in, other parts of the *mauzas* and *mahals*."

Turning now to the documentary evidence in the case, the first paper which calls for notice is the *wajib-ul-arz* which was prepared in the year 1860. A small extract of this document has been printed at page 17 of the printed book in First Appeal No. 291 of 1920. We have, however, referred to the certified copy of the whole *wajib-ul-arz* which is upon the record and a great deal of which has not been printed. According to what is set out in this document, a declaration was made in or about the year 1860 by certain persons whose names are mentioned at the beginning of the document and who presumably were the proprietors of the village at that time. We have compared these names with the pedigree set

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out in the court below and we are satisfied that the declarants were members of the pattidari body in this village.

In the fifth paragraph of this document there is recorded what purports to be the custom of the pattidari. It is declared that every co-sharer has power to transfer by sale and mortgage his land or his share to the extent of his possession. At the time the first portion is made, the condition to be observed is that, if any co-sharer wants to transfer his share, then, first of all, his near co-sharer shall be entitled to have it and, in case of his refusal, his other co-sharers shall be entitled; and if all refuse or do not offer a suitable price, then the share can be transferred to a third person, and no co-sharer shall have any right of pre-emption.

Paragraph 11 of this document which has not been printed but which, as we have said, is on the record, contains a further portion of the declaration made by the village proprietors at this time, namely, 1860. They set out that in this *mauza* of Dudhi there is an area of 39 bighas 10 biswas, settlement *arazi bandobasti*, belonging to two persons Indar Dat and Sundar Dat Pande. There is a further reference to two other plots, which are described in a similar way. Dealing with all these plots, the declaration of the proprietors of the village is that the persons named, Indar Dat and others, are in possession of these *arazi* lands upon payment of Government revenue. It is further set out that the declarants, *i.e.*, the proprietors, will not interfere with them in any way (*un se kuchh muzahimat na karenge*).

The next document to which we have been referred is printed at page 11 of the paper book in First Appeal No. 291 of 1920. This is called a Shajra-i-Khewat of *mauza* Dudhi and appears to have been prepared in 1293 Fasli, corresponding to the year 1886 A.D., at which time settlement operations in Gorakhpur were going on.

This document sets out that *mauza* Dudhi is an inhabited village in the form of an imperfect *pattidari* tenure. The first two entries relate to two shares of eight annas each, one belonging to Shiam Baran Singh and others, mentioned in *khewat khata* No. 1, and the other described as belonging to Udaibhan Partab Singh and others, mentioned in *khewat khata* No. 2.

The first of these shares of eight annas is described as being in possession of the proprietors, and it is said that both the co-sharers collect rent from the tenants and, after payment of

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Government revenue, cesses and village expenses, the account is adjusted at the end of the year. The second share of eight annas is described as being in the possession of a lessee, and, according to the column of remarks, this lessee, after making collections from the tenants, deposits his lease money, according to the conditions of his lease, with the proprietors, who themselves pay the Government revenue and cesses into the Government treasury and obtain revenue receipts.

Following these two entries we have two entries, Nos. 3 and 4, relating to parcels of *shamilat* land. One is *shamilat* of Thakurdhan Partab Singh and others, measuring 8 bighas odd; the other is *shamilat deh* or village common land, amounting to 19 bighas.

These four entries are followed by four other entries, Nos. 5, 6, 7 and 8. The entries Nos. 5, 6 and 7 are shown to relate to two persons who are styled "*araziders*." That is the title above the entries in question. The first of these, entry No. 5, relates to the *arazi* of one Indar Dat who, we understand, is now represented by the appellants. Entries Nos. 6 and 7 relate to the *arazi* holdings of other persons with whom we are not concerned in the present case. The last entry, No. 8, relates to a small area which is held by one Shankar Dat as *shankalap*. He is described in the paper as a *shankalapdar*.

Attached to this statement of the shares and areas in the village there is the usual statement which accompanies papers of this kind and which is construed as being a *wajib-ul-arz*, and in this a custom of pre-emption is set out in paragraph 5 as follows:—

"If any person wants to transfer his property (*laqiat*) he should transfer it first to his own brother and near relation and then to a distant relation. In case of refusal he should transfer it to the co-sharers in the *patti* and then to the co-sharers in the village. If none of these persons should take it or pay a proper price, the transferor shall have power to transfer his share to whomsoever he likes."

The appellants have taken their stand upon the passage which has just been cited and they maintain that they are entitled for the purposes of pre-emption to be treated as co-sharers in the village. It is to be noted in this connection that the *wajib-ul-arz* attached to this *khewat* prepared in the year 1293 Fasli is signed not only by persons who are undoubtedly the proprietors of the village, but also by Indar Dat and one at least of the other *araziders*. Great stress, we may observe, has

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Lastly, we have before us Ex. 4, which is a copy of the settlement *khewat* of *mauza* Dudhi prepared at the recent settlement, in the year 1323 Fasli, corresponding to 1916-17 A.D.

By this time, apparently the constitution of the village had somewhat altered and we find that instead of two *pattis* of eight annas each, there is one share amounting to sixteen annas which is recorded as being the property of Udaibhan Partab Singh, the *lambardar*. Opposite this entry we find the statement of Government revenue, and in the last column we find a schedule showing who the present proprietors are. This column also sets out that at the time the record was prepared two annas out of the sixteen annas were in possession of the owners and that the remaining fourteen anna share was in the possession of mortgagees.

The second entry in this document stands in the name of one Sahdeo Prasad Tiwari, *lambardar*. This entry relates to an area of 46.52 acres.

The Government revenue assessed on this area is set out as Rs.76 and the names of the persons who are interested in this area and who are called *arazidars* are set out in the column of remarks. Those names include the names of the appellants.

The third entry relates to another area of *arazi* in the possession of Mahabir Das, *lambardar*, and the fourth entry also relates to a similar holding in the possession of the same person. The total area of the *arazi* holding is given as 54.85 acres and the total revenue on this area is given as Rs. 72-14-0, and then for the last entry we have it stated that the entire area of the *mauza* is 543.96 acres and the total Government revenue including the revenue assessed on the *arazidari* holding comes to Rs. 614 for the first five years of the period of settlement.

In the remarks column opposite this last entry it is stated that this is the total of the *mahal* (*mahal kul*).

These are the relevant papers which we have to consider and it has been argued very forcibly by Dr. *Agarwala* that on these entries his clients ought to be treated as persons who had the status of co-sharers in the village.

We have omitted to state in dealing with Ex. No 2,

Fasli, that in describing the holding of Indar Dat *arazidar* the column of remarks sets out the following particulars:—

"He is the sole proprietor (*malik wahid*). He deposits into the Government treasury the Government revenue and cesses and obtains revenue receipts and defrays the village expenses from his own pocket."

Similar entries are made in respect of two other persons whose names are entered as *arazidars*.

The learned Judge of the court below has, in his judgment, referred to another judgment of this Court, apart from the Full Bench ruling which we have already cited. This is the case of *Mahadeo Prasad* v. *Jagar Deo Gir* (1). That was a case in which a certain area in a village which had once been held revenue free had become assessed to revenue in the year 1840. There it was found that the holder of this plot of resumed *muafi* paid his revenue direct to Government, and the question arose, in that case, whether or not this person would be entitled to claim the status of co-sharer in the 16 anna *mahal*. A number of rulings of this Court were referred to and it was laid down, as it has been laid down in other cases, that the ultimate test in a litigation of this kind, in which a right of pre-emption is claimed, is whether or not the person who seeks pre-emption is a co-sharer either in the profits or in the liability for revenue with the vendors. It was held, under a long series of rulings, that owners of resumed *muafi* plots had been treated as not being co-sharers within the meaning of the *wajib-ul-arz*. The learned Judge of the court below was, we think, right in relying upon this ruling, although it does not appear, as a matter of certainty, whether the *arazi* lands, with which we are now concerned in the present case, were once held revenue free and were afterwards assessed to revenue. Judging from the definition given by Mr. Tumsden, we should imagine that at some remote period they had been held free of revenue and had been subsequently assessed. The point, however, is not of much importance, for it seems to us that if this case is to be decided upon the principles which are laid down in the case just cited, *Mahadeo Prasad* v. *Jagar Deo Gir* (1), then we must agree with the lower court and hold that the appellants here have no right of pre-emption.

Dr. *Agarwala*, in pressing his claim for the recognition of his clients as co-sharers in the village, has laid considerable stress on the provisions of section 142 of the Land Revenue Act (U. P. Act III of 1901), which lays down that all the

(1) (1916) I. L. R., 38 All., 260.

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proprietors of a *mahal* are jointly and severally responsible to Government for the revenue, for the time being assessed thereon. He claims that having regard to the present constitution of this village his clients are persons who ought to be deemed proprietors within the meaning of this section and his argument implies, therefore, that there is, as between his clients and the persons who are the proprietors of the village, a community of interest and also a community of responsibility for the Government revenue.

That argument, however, does not seem to us to be borne out by what we find recorded in the various papers to which we have referred. In the first place, we must lay stress upon the declaration which was made in the year 1860. At that time the *arazi* lands in which the appellants are co-sharers were in the possession of Indar Dat and Sundar Dat, and the persons who were making the declaration on that occasion declared most distinctly that these *arazidars* were in possession on payment of their own Government revenue and that they (the proprietors) would not exercise any interference whatever with them. That is a very solid piece of evidence for the purpose of showing that there is no community of interest between the proprietary body of this village and the *arazidars*. Then again we refer to the remarks which are set out against the names of those *arazidars* in the *khewat* of 1293 Fasli. We have already mentioned that Indar Dat is there described as being the "sole proprietor" of the area entered against his name. It is further stated that he (Indar Dat) deposits the revenue in the treasury and obtains receipts and defrays village expenses from his own pocket. We take this entry to mean that the responsibility for the Government revenue assessed upon the area in Indar Dat's possession was a responsibility which was confined to himself and with which the proprietors of the two *pattis* of eight annas each had no concern whatever.

Dr. *Agarwala's* argument really rests in a great measure upon the form in which the *khewat* of the recent settlement of 1323 Fasli has been prepared. He has pointed out that after the various interests of the village have been set out in detail, with particulars of the areas and the Government revenue assessed, a total has been made of the whole, and he, therefore, asks us to hold that the inference from all this is that his clients, who are interested in the property specified in the second entry, are, for that reason, persons who have an

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interest in the *mahal*. If there were no other evidence in the case except this bare statement, it might be possible to say something in favour of this argument, but having before us the previous history of the village set out in the various papers, we must hold that the *arazidars* of this village are not co-sharers and have no community of interest or [illegible] with the proprietary body. All this brings us again to the definition of Mr. Reid, quoted in paragraph 187 of the Settlement Report of Gorakhpur, to which we have referred. Mr. Reid, who was a great authority on all revenue questions in this province, has distinctly laid it down that *arazis* are plots of land which, though included within the area of *mauzas* and *mahals*, are held as a distinct tenure from and convey no title to rights or interests in other parts of the *mauzas* and *mahals*.

That appears to us to be exactly the situation here. These plots of *arazi* lands may be within the area of *mauza* Dudhi or in the area of the *mahal* which goes by that name, but they are held on a distinct tenure from that of the *mauza* or *mahal* and their ownership conveys no title to any right or interest in other parts of the *mauzas* or *mahals*. We think, therefore, that the learned Subordinate Judge came to a right decision in this case and both the appeals, therefore, fail and are dismissed with costs.

Appeals dismissed.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

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November, 21.

JASSUMI CHAND (PLAINTIFF) v. MUSAMMAT ANANDI AND OTHERS (DEFENDANTS)*

Hindu law—Joint Hindu family—Will by a party of two Hindus being owners of joint family property to make a joint will.

If a Hindu is the absolute owner of property, whether ancestral or self acquired, he can bequeath it by will, and in principle there is no objection to the same power being accorded to two or more Hindus, provided that they together have the entire ownership of the whole of the property in question. *Nagalutchmee Ummal* v. *Gopoo Kadiroom Chetty* (1), *Jagan Nath Pershad Sahee* v. *Maharajah Rajendur Pershad Sahee* (2), *Vellinayagam Pillai* v. *Pacheche* (3), *Jotendromohun Tagore* v. *Gunendromohun Tagore* (4), *Munshi Indar Sahai* v. *Kunwar Sham Bahadur* (5), *Lakshman Dada Naik* v. *Ram Chandra Dada Naik* (6), *Lal Mohrahmo* v. *Bai Mamoobai* (7) and *Balgobind Das* v. *Narain Lal* (8), referred to.

* First Appeal No. 318 of 1919, from a decree of Dyare Lal, Second Additional Subordinate Judge of Meerut, dated the 18th of July, 1919.

(1) (1856) 6 Moo. I. A., 309.
(2) (1867) 12 Moo. I. A., 1.
(3) (1863) 1 Mad. H. C. Rep., 326.
(4) (1872) 18 W. R., P. C., 383.
(5) (1912) 17 C. W. N., 509.
(6) (1864) I. L. R., 5 Bom., 48.
(7) (1897) L. R., 24 I. A., 93.
(8) (1893) I. L. R., 15 All., 339.

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LAKSHMI CHAND v. MUSAMMAT ANANDI.

THE facts of this case are fully stated in the judgment of the Chief Justice.

Mr. B. E. O'Conor, and Munshi *Ram Nama Prasad*, for the appellant.

Dr. S. M. Sulaiman, for the respondents.

MEARS, C.J. :—On the 5th of June, 1915, two brothers, by name Baldeo Sahai and Lakshmi Chand, Bohra Brahmans, were the owners in possession of the whole joint family property. Each had a wife, each had daughters, neither had a son. Baldeo Sahai was ill, and on the 5th of June, 1915, the two brothers executed a document, on which this appeal is based. If on its true construction it is valid by Hindu law, either as a will or as a family settlement, then it is agreed that the claim of Lakshmi Chand, brought as it was against the widow of Baldeo Sahai, must fail.

In the lower court Lakshmi Chand contended that the document had no legal validity, because on the death of Baldeo Sahai, (which occurred on the 10th of June, 1915,) he, Lakshmi Chand, became thereby the owner of the entire property. Musammat Anandi resisted the claim on the ground that she was in possession of the property in suit by virtue of the document of the 5th of June, 1915. On her behalf it is said that the document, whether legal as a will or not, could not be impeached because it had been executed by Lakshmi Chand to avert a partition upon which Baldeo Sahai had determined a few months previously; and some evidence of a rather shadowy character was given in support of this suggestion. A pleader's clerk testified to procuring the *khewats* of upwards of 30 villages for the purpose of filing them with the application for partition. Lakshmi Chand agrees that those *khewats* were obtained, and alleges that the reason was not because of any intended partition but because other zamindars had got like documents under the apprehension that either as the direct or indirect result of the war the buildings and records might be destroyed. We have remarked upon the absence of the evidence of Mr. Tirbeni Sahai, the pleader, who must certainly have known about the matter, and as he has not been called we are inclined to look with some suspicion on the bare statement of his clerk as to the object with which the *khewats* were obtained. We are therefore not prepared to hold that there was a bargain between the brothers that if Baldeo Sahai would not proceed with the partition, Lakshmi

Chand would execute a document in the terms of the one before us.

Counsel for the respondent has urged that the document in question is a joint will and that the brothers were competent to make it. It has also been put forward that each brother was apprehensive as to the financial future of his wife in the event of his predeceasing her, and that each wished to secure for his wife (in the event of her becoming a widow) a more certain and generous provision than she would have as the ordinary widow of a deceased member of a joint Hindu family. To secure that object, each gave up his expectancy of outliving the other, with its consequential financial benefit, in consideration of the assured position which the widow of either would obtain under the document. We are of opinion that the respondent is right on both these contentions.

The document sets out that Baldeo Sahai and Lakshmi Chand are full brothers and members of a joint Hindu family, that they have no male issue but each has a wife and female issue, and they expressly state that this document is being executed in order to avoid future disputes, and they then proceed to make the following "declaration which shall be binding on ourselves and our representatives, that in the event of one party dying without any male issue, the name of the widow shall be entered in the public papers, that the party remaining alive shall have no objection to the same, that if the surviving party has male issue, in that case, after the death of the widow of the deceased party, the son or the sons of the other party shall be the owner or owners of the entire estate, that the daughters or their sons shall have no right as against the son or sons of the other party, and that the widow of the deceased party shall have no right at any time to make any transfer whatsoever." They then provided that only in the event of both the parties dying without male issue, should the daughters or their male issue be entitled to the estate of their father, and they made other provision for the devolution of the estate. In clause 7 they agree that the document shall cease to be binding if at any time in their joint lives they divide the estate by mutual agreement, and they provide that if either of them should subsequently have male issue, that male issue should become the owner of the entire estate. A later clause negatives any suggestion that the document was intended to effect a partition, negatives the right of the widow of the deceased

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party to sue for [illegible] and [illegible] we understand to be one half share of the profits, and the agreement concludes by stating that it is a will. We therefore execute this agreement by way of a will in order that it may serve as a will."

The appellant contends that this document is a will and has urged upon us that a member of a joint Hindu family cannot make a will. The question, however, is whether Baldeo Sahai and Lakshmi Chand, who between them owned all the [illegible], could execute jointly a document of this character which would in law take effect on the death of the first of them.

Cases were cited in argument on both sides and we think that the true result of the authorities at the present day is, that if a Hindu is the absolute owner of the property, whether ancestral or self-acquired, he can bequeath it by will, and in principle we are unable to see any objection to the same power being accorded to two or more Hindus, provided they [illegible] the entire ownership of the whole of the co-parcenary property. In the case of *Nanal Chand Chunnil* v. *Appoo Nadaraja Chetty* (1) it was held that [illegible] was in possession [illegible] co-parcener, could dispose of his property by will. The question was regarded as one of considerable importance and the Civil Judge laid the facts before the Pandits of the Sadar Dewani Adaulat at Madras. They gave an answer affirming the power of the Hindu to make a disposition of his property in the circumstances before them, and the Judge having pronounced an opinion in favour of the will, the matter came before the Privy Council. They stated:—"The strictness of the ancient law had long since been relaxed and those in Bengal a man who is the absolute owner of the property may now dispose of it by will as he pleases; whether it be ancestral or not . . . Even in Madras it is settled that a will of property, not ancestral, may be good; a decision to this effect has been recognized and acted upon by the Judicial Committee, and indeed the rule of law to that extent is not disputed in this case."

In 1867 the Privy Council laid down, in the case of *Baboo Beer Pertab Sahee* v. *Maharajah Rajender Pertab Sahee* (2), that "Decided cases, too numerous to be now questioned, have determined that the testamentary power exists, and may

(1) (1856) 6 Moo. I. A., 309.
(2) (1867) 12 Moo. I. A., 1.

be exercised, at least within the limits which the law ; to alienation by gift *inter vivos*."

A similar question came before the Privy Council a few years later in the case of *Vallabhaneni Pillai* v. *Pachchu* (4). A reference to pages 336 to 338 shows that the Privy Council regarded the power of disposal by will of a Hindu as settled, at all events to the extent to which a gift or other disposal by act *inter vivos* would have the force of law.

In the case of *Jatendramohan Tagore* v. *Gunendramohan Tagore* (2), their Lordships of the Privy Council at page 366 said as follows :—"As to gifts by way of will, whatever doubts may have once been entertained by learned persons as to the existence of the testamentary power, those doubts have been dispelled by a course of practice, in itself enough, if necessary, to establish an approved usage, and by a series of judicial decisions, both here and in India, proceeding upon the assumption that gifts by will are legally binding, and recognizing the validity of that form of gift as part and parcel of the general law." Their Lordships at page 367 lay down certain limitations as to the persons capable of taking, and it is to be noticed in this case under appeal that the learned Subordinate Judge gave a decision affecting the case as far as it concerned Musammat Anandi, who was of course alive at the date of the death of the testator.

In the case of *Munshi Indar Sahai* v. *Kunwar Shiam Bahadur* (3) it will be noticed that their Lordships of the Privy Council at page 512, when dealing with what was a question of fact in that case, as to whether or not the members of the joint family had consented to the will of the testator, assumed that the will would have been valid had consent been satisfactorily proved. Other cases which might usefully be referred to are *Lakshman Dada Naik* v. *Ram Chandra Dada Naik* (4), *Bai Motivahoo* v. *Bai Mamoobai* (5) and *Balgobind Das* v. *Narain Lal* (6).

We are therefore of opinion that the respondent is right in claiming that the document in suit is a will, and is a joint one, which it was legally competent for Baldeo Sahai and Lakshmi Chand to make.

(1) (1863) 1 Mad., H. C. Rep., 326.
(2) (1872) 18 W. R., P. C., 359.
(3) (1912) 17 C. W. N., 509.
(4) (1880) I. L. R., 5 Bom. 48 (61, 62).
(5) (1897) L. R., 24 I. A., 93 (105).
(6) (1893) I. L. R., 15 All., 339.

Quite apart from this consideration, we are, as we have already said, also of opinion that the contention is well founded that the document embodied a mutual bargain, supported by legal consideration. Each party gave up the possibility of his surviving his brother, with the consequential financial advantage in that case, in consideration of obtaining for his wife a far more assured monetary position than she would otherwise have had as the widow of a deceased Hindu member of a joint family.

We are therefore of opinion that the decision of the learned Subordinate Judge was right. We dismiss the appeal with costs.

BANERJI, J.:—I have had the advantage of reading the judgment of the learned Chief Justice and fully agree with it.

BY THE COURT:—The order of the Court is that the appeal is dismissed with costs

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Ryves.

1922 November, 25.

EMPEROR v. HIRA AND OTHERS.*

Act No. XLV of 1860 (Indian Penal Code), section 97—Riot—Right of private defence—Right to take precautions against an antic pated attack.

Certain persons who were lawfully in possession, as tenants, of agricultural land, having reason to suppose that it was possible that they might be attacked and ejected from the land by force, made a practice of keeping their *lathis* in readiness, and also provided the tenants of some adjacent fields to do likewise. The expected attack came, and there was a somewhat severe fight, in the course of which both parties were injured.

Held that the defenders were within their rights in holding themselves in readiness to repel an attack if and when it should come, and were protected by section 97 of the Indian Penal Code. *Queen Empress* v. *Narsana Pathabai* (1), *Regula Bheemappa* v. *Emperor* (2), *Queen Empress* v. *Timmal* (3) and *Queen-Empress* v. *Prag Dat* (4), referred to.

THE facts of this case are clearly stated in the judgment of the Court.

Mr. *C. Ross Alston* and Mr. *G. W. Dillon*, for the appellants.

The Government Pleader (Mr. *Sankar Saran*), for the Crown.

* Criminal Appeal No. 741 of 1922, from an order of D. C. Hunter, Sessions Judge of Bulandshahr, dated the 18th of September, 1922.

(1) (1890) I. L. R., 14 Bom., 441.
(2) (1902) I. L. R., 26 Mad., 249.
(3) (1898) I. L. R., 21 All., 122.
(4) (1898) I. L. R., 20 All., 469.

IVERS, J. :—In this case seven men were convicted by the learned Sessions Judge of Bulandshahr under section 147 and section 304 of the Indian Penal Code and sentenced to rigorous imprisonment for six months. A large number were accused, but as those persons were admittedly in the fight they alone were convicted and the remainder were given the benefit of the doubt. They have appealed.

The learned Sessions Judge has tried the case very carefully and has written a very full judgment. He has found the facts very clearly up to a certain point. They are as follows :—

The complainants were a large body of persons composed chiefly of the adherents of Alli, a Muhammadan, and the adherents of a Hindu who made common cause. These persons, as shown from the judgment, had for a long series of years continued in unlawful possession of some plots of land in the village. The former zamindar, after protracted litigation up to the Board of Revenue, had established the fact that the complainants were trespassers who had no sort of right to possession of the fields. They were then sued for ejectment in the Revenue Courts and decrees were passed against them, and although execution was taken out and they were ejected in due course of law, they nevertheless continued in possession of the fields. The zamindar sold the village to a leading vakil of Aligarh and he found the tenants equally recalcitrant. Failing to evict them by the Civil Courts he brought complaints against them for criminal trespass in the Criminal Court, and on conviction they were imprisoned and formal possession was made over to the zamindar. As soon, however, as they came out of prison they forcibly re-took possession of the land. They were imprisoned again for a similar offence at the beginning of this year. The zamindar then let out these fields by registered lease to some of the accused, and towards the end of last June the accused, who were lessees of the land and were in peaceful and lawful possession thereof, were engaged in ploughing one of the fields. Thereupon the complainants in a large body came up armed with *lathis* and attacked the tenants, who called for assistance to the cultivators from the neighbouring fields who rushed up. They all had *lathis* with them and they resisted the very deliberate and prolonged attack made on them by the complainants. Considerable injury was caused to persons on both sides and Alli, the leader of the complainants'

party, ultimately succumbed. Having arrived at this finding, the learned Sessions Judge does not go on to find in so many words who were the aggressors, because in his opinion "It is quite immaterial whether the zamindar's men were ploughing and were attacked by Alli's supporters or whether Alli's supporters were ploughing and were attacked by the zamindar's men or whether both parties started off to take possession of the field and met there and fought it out. It is immaterial who got there first. The point is that both sides intended to make a fight of it." The learned Judge says in another portion of his judgment, "It is [illegible] to believe that there was that entire absence of [illegible] and premeditation that the accused suggest," and he thinks it unlikely that the men who were *cultivating* neighbouring fields or were cutting grass there went out armed with *lathis* without any apprehension of being involved in fighting. He goes on to say:—"That the zamindar's party had the right to plough the field I do not for a moment dispute, but I say that they collected their supporters, whether seven or ten or sixteen is hardly material, but they collected their supporters, armed with *lathis*, and intended fighting it out; that is to say, in the words of the law, they were an assembly of five or more persons with a common object, and that common object was by show of force to enforce their rights. I fear I cannot appreciate the distinction which certain very learned Judges of the Honourable the High Court at Calcutta have attempted to make between enforcing a right and maintaining a right."

Before I discuss the law it seems to me necessary to come to a definite conclusion as to what were the facts, because it is only when the facts have been found with certainty that it becomes profitable or indeed possible to see what the law is that is applicable. I hold, and I think the learned Sessions Judge meant to hold, that the accused party, who were tenants of the fields under a lease and were in peaceful possession of those fields as tenants and were engaged in ploughing in the ordinary course of husbandry, had taken the precaution to take with them their *lathis* and had also taken the precaution to see that the men engaged in work on the neighbouring fields were also armed, because they knew from the experience of the past that at some time or another it was very likely that the complainants' party would attempt to seize those fields by force, and that is just what happened. I find that the complainants' party attacked the accused with *lathis* and persisted in that

attack, injuring all the accused persons, and intended to persist in that attack until they had recovered possession of the field, but only desisted when their leader was very grievously injured and a large number of themselves had got hurt. In fact they persisted in the fight until they were beaten off. The learned Sessions Judge says that the accused were an assembly of five or more persons with a common object and that common object was by show of force to enforce their rights. It seems to me that the learned Sessions Judge has overlooked the fact that section 141 of the Penal Code, from which he has quoted, must be read with section 96 and the following sections of the Code. On these facts I think the accused were protected by both clauses of section 97, that is to say, that they had a right to defend their own persons and the persons of others against an offence affecting the human body, and (2) that they had the right to defend the property against the complainants who were committing or attempting to commit at least the offence of criminal trespass. The learned Sessions Judge says that he is unable to appreciate the distinction which the learned Judges of the Calcutta High Court have drawn between enforcing a right and maintaining a right, but this view is not confined to the Calcutta High Court. It is, as far as I know, recognized by all the High Courts in India: See *Queen-Empress* v. *Narsang Pathabai* (1) and *Regula Bheemappa* v. *Emperor* (2), and more particularly our own High Court in the case of *Queen-Empress* v. *Timmal* (3), to which I call the learned Sessions Judge's special attention, more particularly to the remarks on page 125 of the report. It is not opposed to the case of *Queen-Empress* v. *Prag Dat* (4), the head-note to which case is misleading. The head-note says:—"When a body of men are determined to vindicate their rights or supposed rights by unlawful force and when they engage in a fight with men who on the other hand are equally determined to vindicate by unlawful force their rights or supposed rights, no question of self-defence raises." This passage is taken from the judgment, but the very next sentence in the judgment has not been quoted. It is to the effect, "Neither side is trying to protect itself but each side is trying to get the better of the other." It sometimes happens that two

(1) (1899) I. L. R., 14 Bom., 441.
(2) (1902) I. L. R., 26 Mad., 249.
(3) (1898) I. L. R., 21 All., 122.
(4) (1898) I. L. R., 20 All., 460.

parties make the possession of a field or a tree the pretext for a fight and then go out armed to see who are the better men. In such cases, as pointed out in *Prag Dat's* case, (1) obviously there is no right of private defence. It is a duel between the parties and nothing short of it. There are some cases reported, in which, owing to the uncertainty of the facts and, sometimes, to the attempts by Judges to express themselves epigrammatically, if I may say so, confusion has arisen and also the head-notes to these cases are often very misleading. It is never safe to accept the law as laid down in a head-note without examining the facts and the reasons given in the judgment, but I think if the cases are examined carefully, it will be found that the decision in each case is justified by the actual facts of that case. It is impossible to lay down any general rule other than that laid down in sections 96, 97 and 99 of the Penal Code on this subject. It is interesting to note that when the Commissioners were framing this part of the law, in their report they say :—" We propose to except from the operation of the penal clauses of the Code large classes of acts done in good faith for the purpose of repelling unlawful aggressions. . . In this country the danger is on the other side; the people are too little disposed to help themselves; the patience with which they submit to the cruel depredations of gangs of robbers and the trespass and mischief committed in the most outrageous manner by bands of ruffians is one of the most remarkable, and at the same time one of the most discouraging, symptoms which the state of society in India presents to us."

In this case the accused were perfectly justified in ploughing the land which they had taken on lease. They did not know for a certainty, perhaps, that they would be attacked, but they must have thought that it was so very probable that they would be attacked by Alli and his party sooner or later when opportunity occurred, that it seems to me it would have been most foolish of them not to take precautions to protect themselves as well as their property, and I hold that they were perfectly justified under the circumstances in going armed with *lathis* and, also, as they were few in number and the complainants' party was large they were justified in seeing that their friends and neighbours were armed so that, if necessary, they could come to their assistance. It is not the case that they knew that they were going to be attacked that morning

(1) (1898) I. L. R., 20 All., 469.

and that they had time to have recourse to the civil authorities for protection. They were suddenly set upon by the complainants. If they had a right to protect themselves and their property, as I hold they had, I find that they did not exceed their right. If a man is entitled to protect his own life by using a *lathi*, it is impossible to weigh the force of the blows which he uses for that purpose, as it is said, "in golden scales" and to adjudicate with great nicety as to the exact amount of force which would be justified. This of course is, provided that no undue advantage is taken.

In the result I find that the accused were all of them justified in using force on the assailants in the defence of their property and of their persons and that they did not use more force than was necessary. I therefore allow the appeal, acquit the accused and, as they are on bail, they need not surrender.

Appeal allowed.

APPELLATE CIVIL.

Before Mr Justice Stuart and Mr Justice Ryves.

1922 November 24.

SURAJ MAL AND ANOTHER (DEFENDANTS) v. NATHWA AND OTHERS (PLAINTIFFS) AND AMIN KUNWAR AND ANOTHER (DEFENDANTS)*

Hindu law—Separate Hindu—Collusive mortgage executed in favour of wife's relations—Suit by reversioners for a declaration that the mortgage was fictitious

A separated Hindu, possessed of ample means, and in no need of borrowing money, was induced by his wife to execute a fictitious mortgage in favour of two of her nephews for a sum which was never advanced by them. After executing this mortgage the mortgagor died and his widows entered into possession of his property. *Held* that it was open to the then presumptive reversioners—the widows refusing to take any action in the matter—to sue for a declaration that the mortgage was fictitious and collusive and did not affect their interests in the property mentioned therein. *Rani Anand Kunwar* v. *The Court of Wards* (1), referred to

THE facts of this case are fully set forth in the judgment of the Court.

Mr. *J. M. Banerji*, for the appellants.

Dr. *Surendra Nath Sen*, for the respondents.

STUART and RYVES, JJ. :—The facts of this case are somewhat unusual and our decision is based on the facts as found by the lower appellate court.

It appears that one Nathwa, a separated Hindu, possessing ample means, died in November, 1919.

The suit was brought by four persons, who claimed to be

* Second Appeal No. 1261 of 1920, from a decree of E. R. Neave, District Judge of Meerut, dated the 4th of August, 1920, confirming a decree of Pearey Lal Chaturvedi, Second Additional Subordinate Judge of Meerut, dated the 17th of September, 1919.

(1) (1881) I. L. R., 6 Calc., 764.

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the next reversioners of Nathwa, and it was filed on the 6th of January, 1920. The plaint, after reciting that Nathwa died childless two months before, stated that he left surviving him two widows, Musammat Amin Kunwar and Musammat Hardei, who were entitled to a life-estate in the property and that the plaintiffs were the next reversioners. The plaint goes on to say that on the 1st of March, 1916, Musammat Amin Kunwar persuaded Nathwa to execute a fictitious deed of mortgage in favour of Lakhi and Suraj Mal, her two nephews, defendants Nos. 1 and 2; that this bond is calculated to prejudice the rights of the plaintiffs if it is allowed to subsist. Musammat Amin Kunwar was in collusion with defendants Nos. 1 and 2, and Musammat Hardei refused to join as a plaintiff and so was made a defendant. The prayer was "that it may be declared that the bond dated the 1st of March, 1916, executed in favour of Lakhi and Suraj Mal, is null and void and ineffectual as against the plaintiffs and the property hypothecated." Musammat Hardei did not appear and has taken no part in the litigation. Lakhi and Suraj Mal in their written statement contested the suit on the ground (1) that the plaintiffs were not reversioners and (2) that the bond had been lawfully executed for a real debt and that they had already instituted a suit on the 6th of January, 1920 (the very day on which the plaintiffs instituted this suit), to recover the money due to them on the mortgage bond. They denied that Musammat Hardei was a widow of Nathwa. Musammat Amin Kunwar put in a similar defence denying that she had instigated Nathwa to execute the mortgage. She also denied that Musammat Hardei was a widow of Nathwa.

The courts below have found, and the finding is conclusive in second appeal, that Nathwa was a separated Hindu possessed of ample means and that the plaintiffs are the next reversioners. They also found that Lakhi and Suraj Mal, the defendants Nos. 1 and 2, were near relations of Musammat Amin Kunwar and were living in great poverty in another village. As evidence of this it was found that in order to satisfy a petty debt they had to give up a small occupancy holding which they had, and, in execution of a decree for about Rs. 100, had to sell their home. Musammat Amin Kunwar had brought them to live with her and had persuaded Nathwa to execute this document in their favour.

The document was executed for a consideration of Rs. 4,000, of which Rs. 1,500 was said to be due on a previous

mortgage made by Nathwa in favour of Lakhi and Suraj Mal. The deed further recited that the balance of the money was required to construct a well, purchase bullocks and buffaloes, and to meet the expenses of a *karao* marriage. In the words of the trial court: "All necessities known to ordinary laymen were pressed into service." The courts below found that Nathwa was in no need of money, as he was carrying on a successful banking business and was possessed of ample zamindari property, that he was 60 years of age and already had two wives, so that there was no foundation for the allegation that he wished to contract a third *karao* marriage. Having found that Nathwa had no occasion whatsoever to borrow money, it was found that the defendants could not possibly have advanced any money at all to Nathwa on the occasion of this bond or previously. In fact they found that Musammat Amin Kunwar had persuaded her husband to execute this fictitious bond in order to benefit her nephews. They also found that Musammat Amin Kunwar was acting in collusion with Lakhi and Suraj Mal, and this fact was corroborated up to the hilt by the circumstance that, on their suit for sale on the mortgage, she had confessed judgment and a decree had been passed against her. On these findings the plaintiffs' suit was decreed.

Lakhi and Suraj Mal come here in second appeal and urge that Nathwa, being a separated Hindu without children, was entitled to do whatsoever he pleased with his property and that the plaintiffs are not entitled to sue during the life-time of the widows, and that, in any case, they can only get the property subject to the encumbrance created by Nathwa. It is no doubt perfectly correct to say that Nathwa could have made a valid gift in favour of Lakhi and Suraj Mal, if he had so wished, and if he had done so and put them in possession of the property during his life-time, the gift could not have been contested by the plaintiffs. Similarly he might have made a will leaving property to them to take effect after his death, but he did not do anything of the kind.

With regard to the second ground, it is enough to say that Musammat Amin Kunwar, by her conduct in colluding with Lakhi and Suraj Mal and Musammat Hardei, if she is a widow of Nathwa (a point which has not been decided in this case as she did not appear), has, by her conduct in refusing to join in the suit, opened the way for the plaintiffs to bring this suit,

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Privy Council, of which it is only necessary to note *Rani Anand Kunwar* v. *The Court of Wards* (1).

On the third point it is necessary to observe that this suit was brought with the object of establishing the real nature of the transaction evidenced by the deed of the 1st of March, 1916. That document, on the face of it, created a mortgage on the property. The widows as representing the estate could have sued to set it aside, but, as shown above, they deliberately made it impossible for them to do so. In the circumstances, we do not see why the reversioners should not be allowed to bring this suit now, when the evidence is fresh, so as to enable the court to decide exactly what was done. It would be, it seems to us, inequitable to hold that they must wait until the widows are both dead, an event which may not happen for many years, before they can bring their suit. Whether the decree which they have obtained will be of any practical use to them is a matter upon which we are not called upon to give an opinion, much less a decision.

In our opinion the appeal fails. It is dismissed with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Ryves

1922

December, 1.

EMPEROR v. DURGA PRASAD AND OTHERS.*

Act No. III of 1867 (Public Gambling Act)—Common gaming house—Presumption—Possible instruments of gaming found in the house, but not in use—Betting—Commission.

Held on application for revision of a conviction under the Public Gambling Act, 1867, (1) that the finding of cards, dice and cowries in a house, the same not being used for purposes of gambling, was not of itself sufficient to give rise to the presumption that the house was a common gaming house; and (2) that the taking by the owner of the house of a percentage on the winnings of persons who made bets with him amounted to nothing more than a discount on the odds which he laid, and did not come within the meaning of "commission," so as to make the transaction an offence under the Act.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Kailas Chandra Mital*, for the applicants.

The Assistant Government Advocate (Mr *R. Malcomson*), for the Crown.

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RYVES, J. :—Durga Prasad, Kewal and Khalil-ur-Rahman have been convicted, the former of keeping a common gaming house and the two latter of gambling. It appears that on information being given to the Superintendent of Police, he was satisfied that gambling was going on in a house rented by Durga Prasad and issued a warrant for a search. On a raid being made, a number of persons were found in the house making wagers on *satta*. A number of books were found in which the bets were recorded. At that time, it seems that this was the only form of wagering that was being carried on. On a search of the house, there is evidence that cards, dice and cowries were found somewhere. But these certainly were not being used. The court below has distinguished this case from the case of *Lachchi Rani* v. *Emperor* (1) by saying that it was not shown in that case that the owner was in the habit of charging commission.

The evidence in this case is that the owner bet Rs. 9-8-0 to one against the last digit of the price of opium at the monthly sale being rightly guessed and Rs. 100 to two against the last two digits. There is evidence also that he charged half an anna per rupee as commission from the winners. This, it seems to me, amounts to nothing more than a discount on the odds which he laid, and I do not think it can come within the meaning of "commission" so as to make it an offence under the Act. According to the decision of this Court which I have quoted, "it must be established that the owner or occupier takes a fixed commission which is irrespective of the result of the gaming, or, at the outside, that he manipulates the conditions in such manner that he cannot possibly lose." That is not the case here. Although the odds 50 to 1 are scarcely fair, they are not such as to make the owner's loss impossible. It seems to me that the Amending Act has not gone far enough to prevent gambling in this form. But, however that may be, I am bound by the decision of this Court to which I have referred. The court below has felt this difficulty and said that it is possible to maintain the convictions for another reason and that is that cards, dice and cowries, which ordinarily are implements of gaming, were found in the house although they were not being used, and that as the Superintendent of Police had issued a warrant, the presumption arises, from the presence of these implements of gaming,

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then going on, that the house is a common gaming house and that the people there were engaged in illegal gaming, unless they could prove the contrary. I think this would be stretching the point unduly against the accused. In my opinion I have no alternative but to hold that the conviction is bad. The result is that I allow these applications and direct that the accused be released.

Application allowed.

APPELLATE CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

1923
December, 4.

HARIHAR PRASAD (OBJECTOR) *v.* UDAI NATH SAH (OPPOSITE PARTY).*

Hindu law—Hindu widow—Gift of husband's property made with the consent of the next presumptive reversioner—Effect of such gift as against next reversioner's creditors.

One Durga Prasad, a separated Hindu of means, died leaving a widow and a daughter. The daughter had a son, Champa Prasad, who was an undischarged insolvent, and a grandson, Harihar Prasad. On the death of Durga Prasad's widow, her daughter proceeded, with the concurrence of the next reversioner, the insolvent Champa Prasad, to make a gift of the whole property in favour of Harihar Prasad.

Held, on suit by one of the creditors on the death of the donor, that the gift in question could not avail to defeat Champa Prasad's right to succeed on the death of his mother, and if Champa Prasad succeeded the claims of his creditors at once accrued. *Rangasami Gounden* v. *Nachiappa Gounden* (1), discussed.

THE facts of this case are fully stated in the judgment of the Court.

Dr. *M. L. Agarwala* and *A. P. Dube*, for the appellant.

Babu *Piari Lal Bancrji*, for the respondent.

PIGGOTT and WALSH, JJ. :—This appeal in an insolvency matter raises a pure question of law. The name of the insolvent is Champa Prasad and he was so adjudicated on the 21st of June, 1918. Champa Prasad's mother was one Ganeshi Kunwar, the daughter of one Durga Prasad. This gentleman died possessed of considerable property, which passed with a widow's estate to his widow, Musammat Mula Kunwar. This lady died in the month of December, 1919, and it is admitted that, thereupon, the property passed to Ganeshi Kunwar, also with the limited estate of a Hindu widow. That lady, however, proceeded to execute at once a deed of gift conveying the whole estate to her grandson, Harihar Prasad, the son of the

* First Appeal No. 134 of 1922, from an order of H. N. Wright, District Judge of Bareilly, dated the 22nd of June, 1922.

(1) (1918) I. L. R., 42 Mad., 823

insolvent Champa Prasad, who joined with her in the execution of the document.

On the death of Musammat Ganeshi Kunwar, the creditors of the insolvent claimed to take this property as that of the insolvent Champa Prasad. On objection taken by Harihar Prasad, the insolvency court has gone into the question, but has upheld the contention of the creditors. The finding of the court below is that this property vested in the insolvent Champa Prasad on the death of his mother, Ganeshi Kunwar. It undoubtedly did so vest, unless it had previously passed to Harihar Prasad under the deed of gift of the 11th of December, 1919.

There is one complication which ought to be mentioned. One of the creditors held a mortgage, affecting a portion of the property concerned, which had been executed by Mula Kunwar, Ganeshi Kunwar and Champa Prasad, jointly, on the 4th of February, 1915. He has obtained a decree on his mortgage in a contested suit to which Harihar Prasad was a party. In that suit the court tried, as between the mortgagee and all the defendants, the issue whether the deed of gift of the 11th of December, 1919, conveyed anything to Harihar Prasad beyond the life-time of Ganeshi Kunwar. In substance the court found that this was an alienation by a Hindu widow without legal necessity; that it conveyed nothing to the donee beyond a right of possession and enjoyment in the life-time of the widow, and that, on the death of Ganeshi Kunwar, the property had vested in the insolvent Champa Prasad. It is suggested that this finding operates as *res judicata*, at any rate, as between the secured creditor and the appellant Harihar Prasad. The only answer to this is a contention on the part of Harihar Prasad that he was not properly represented in the suit on the mortgage. In the view which we take of the law applicable to the case as a whole, it is not necessary for us to go into this question. We thought it advisable to refer to this previous litigation, partly as a matter of record, and also because it is quite clear that in the mortgage suit the question of the validity of the deed of gift in favour of Harihar Prasad was fought out solely on the ground of the presumption or otherwise of legal necessity for the transfer. Now, if this be the right way in which to regard this transfer, then the decision of the trial court is unquestionably right. To begin with, a transfer by way of gift cannot, broadly speaking, be supported

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by any allegation of legal necessity. If the fact that Champa Prasad, being the nearest reversioner living at the time, expressed his consent to the alienation by joining in the same, be relied upon merely as raising a presumption in favour of legal necessity, then that presumption is, in the case now before us, abundantly rebutted. Champa Prasad, having been adjudicated an insolvent, could derive no benefit from his succession to the property, which would revert to the receiver in bankruptcy on the very day he succeeded to it. It was obviously to his advantage to agree to a transfer of that property in favour of his own son and to the detriment of his creditors. The fact of his doing so raises no presumption whatever in favour of the necessity for the alienation.

It has, however, been contended before us that a transfer in favour of a third person—and for the purposes of the question now before us Harihar Prasad must be treated as a third party, who had no concern whatever in the possible devolution by inheritance of the estate in the hands of Ganeshi Kunwar—if made by a Hindu widow with the consent of the nearest reversionary heir living at the time of the alienation, so long as it be a surrender of the entire estate in the hands of such widow, operates as a valid transfer *proprio vigore* and not by reason of the reversioner's consent raising a rebuttable presumption as to legal necessity. This contention is sought to be founded on certain passages in the decision of their Lordships of the Privy Council in the case of *Rangasami Gounden* v. *Nachiappa Gounden* (1), which is the latest and most authoritative pronouncement on the whole question of a Hindu widow's powers in dealing with the property of her husband to which she had succeeded with a life-estate on his death. It seems to us, however, that, where their Lordships definitely sum up the principles which they propose to lay down for the guidance of the courts in India, they limit the cases in which the question of necessity does not fall to be considered to those cases in which there has been a surrender by the widow of her whole interest in the whole of the estate in favour of the nearest reversioner or reversioners at the time of the alienation. They go on to deal with alienations in favour of persons who are not the nearest reversioners for the time being, and they seem to us to place all such alienations in the second category, that is, of alienations which require to be supported on the ground of necessity. We may add that the

(1) (1918) I. L. R., 42 Mad., 323

present case is a particularly strong one. The older opinion, which was to some extent supported by decisions discussed in the judgment of their Lordships of the Privy Council above referred to, which treated a conveyance by a widow in favour of a third party as valid *proprio vigore* if made with the consent of the nearest reversioner or reversioners alive on the date of such alienation, was based upon the notion that there was a surrender of the estate into the hands of such reversioner or reversioners, instantly followed by a conveyance to a third party Such a doctrine could not be applied in the present case because, if there was any vesting of the estate for a single moment in Champa Prasad on the day on which his mother Ganeshi Kunwar surrendered it by executing the deed of gift of the 11th of December, 1919, in that very same instant whatever rights vested in Champa Prasad passed to the receiver in insolvency and there was nothing which Champa Prasad could convey to his son. We are satisfied, therefore, that the decision under appeal is correct. We dismiss this appeal with costs.

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Appeal dismissed.

REVISIONAL CIVIL.

Before Mr. Justice Piggott and Mr. Justice Walsh.

JHINKU SINGH (PLAINTIFF) *v.* SITAL SINGH (DEFENDANT).*

Civil Procedure Code, schedule II, paragraph 15—Arbitration award in favour of minors—Agreement by next friend to set aside award and refer matters in dispute again to arbitration—Court not competent to set aside previous award.

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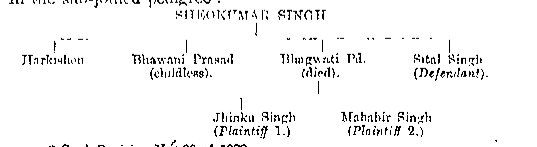
The plaintiffs, who were minors, held an award in their favour. The defendant objected to the award. Pending the decision of the defendant's objections, the parties came to an agreement by which the first award was to be cancelled and the dispute again referred to arbitration, the valids for the respective parties to act as arbitrators, and the Court made an order accordingly.

Held that the Court had no power to set aside the first award, except on one or other of the grounds provided for in the second schedule to the Code of Civil Procedure.

THE parties in this case were related in the manner shown in the sub-joined pedigree :—



* Civil Revision No. 80 of 1922

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JHINKU SINGH v. SITAL SINGH.

Jhinku Singh and Mahabir Singh, minors, brought a suit through their mother's brother as next friend, for a declaration that a certain deed of gift, dated the 16th of April, 1920, purporting to have been executed by Harkishen, in favour of Sital Singh, was invalid and ineffectual as it was executed in a state of jointness. The defence was that the family was separate, and, therefore, the gift was valid. The matter was referred to arbitration through court, and, on the 17th of September, 1921, the arbitrators gave their award in favour of the minor plaintiffs, holding that the family was joint at the time of the execution of the deed of gift, whereupon the court, on the objection of the defendant, passed the following order:—"The parties present in court stated that with the consent of the parties the award be cancelled and the matter be referred to the arbitration of counsel for the parties. Therefore it is ordered that the award be cancelled . . . The counsel for the parties may take the record of the case . . ." The vakils for the parties gave their award on the 27th of February, 1922, holding the gift valid as having been executed in a state of separation. The plaintiffs took objection but the court ordered the award to be filed.

Plaintiffs applied in revision.

Munshi *Shiva Prasad Sinha* (with him Dr. *S. M. Sulaiman*), for the applicant, submitted that the first award being in favour of the minors, the court below had erred in setting it aside without considering the question of its validity or otherwise. Paragraph 15 of schedule II of the Code of Civil Procedure laid down the grounds on which the award could be set aside. Not a single ground existed in this case. The court below was under the impression that consent was enough. In the first place, consent was not one of the grounds mentioned in the Code of Civil Procedure and, even if it were, the plaintiffs never consented. The next friend consented and the court should have seen whether his consent was in the interest of the minors or not. Obviously it was not, for the minors obtained from the first award all that they wanted. A "next friend" was nothing more than a guide or a friend, as his very name suggested. He was not a party.

Pandit *Narmadeshwar Prasad Upadhya* (for Munshi *Haribans Sahai*), for the opposite party, submitted that the decision of the first court was final on all those points. He relied upon *Lutawan* v. *Lachiya* (1). They took strong objec-

(1) (1913) I. L. R., 36 All., 69.

tion to the first award and when the other side saw that it was bound to be set aside, the next friend consented. It could not be said that these considerations were not present to the mind of the Subordinate Judge or that he did not consider them. There was no question of jurisdiction involved in this revision. He relied upon *Balakrishna Udayar* v. *Vasudeva Ayyer* (1) and *Fazal Rab* v. *Manzur Ahmad* (2).

The second award clearly showed that the plaintiffs had no case on the merits. It was proved that the family was separate.

Munshi *Shiva Prasad Sinha* was not called upon to reply.

PIGGOTT, J. :—As the order we propose to pass at present will not finally dispose of this application, we need not say more than is absolutely necessary to make our order clear to the lower court. In a suit, in which certain minor plaintiffs were suing through their next friend, there was a reference to arbitration. An award was returned in favour of the plaintiffs. The contesting defendant filed an affidavit of objections, assailing the award upon a great variety of grounds. The court had fixed a certain date for hearing these objections. Before that date arrived, an application was made orally to the court to the effect that the parties were agreed together that the arbitration award, in favour of the plaintiffs, should be set aside and a fresh reference made to the arbitration of two persons who were counsels appearing for the respective parties. We have it from a subsequent order of the trial court that the learned Subordinate Judge thought that he had no option, upon such an application having been made, but to set aside the award and submit the dispute to what we may call the second set of arbitrators. He refers to a reported decision of this court in the case of *Lutawan* v. *Lachya* (3) in which it was held that the next friend or guardian *ad litem* of a minor litigant can refer the case to arbitration without obtaining the leave of the court. The learned Subordinate Judge has altogether overlooked the fact that he had before him an arbitration award, which was valid and binding upon the parties unless set aside for any of the reasons stated in the schedule dealing with references to arbitration. The question which he had to consider was whether the next friend of the minor plaintiffs, in whose favour an award had been made, could so compromise

(1) (1917) I. L. R., 40 Mad., 793
(2) (1918) I. L. R., 40 All., 425.
(3) (1913) I. L. R., 36 All., 69

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the dispute as to the validity of that award as to give the court no option but to accept the compromise and, therefore, to preclude the court altogether from considering whether it was one which, in the interests of the minors, ought to have been entered into. A peculiar feature of the present case is that one of the arbitrators named in this second submission was the counsel appearing for the minor plaintiffs who, we find, actually obtained a fee of Rs. 100 for his services as arbitrator. If he had advised his clients to throw up the first award, which was in their favour, we think his conduct in consenting to act as one of the second set of arbitrators was improper, because he put himself in such a position that his interests and his duty were in conflict. However, as the record now stands, we think the most suitable orders for us to pass are that there should be an inquiry into the objections taken by the contesting defendants to the first award and that the result of the inquiry should be certified to us, before we pass any final orders on this application. The said application will, therefore, remain on the pending file of this Court but the record will be sent down to the court below with the request that the said court should inquire into, after proper notice to the parties concerned, the objections filed by the contesting defendants to the first award and should report to this Court the result of such inquiry. The case will then be put up again for hearing as soon as possible after the receipt of the lower court's report.

WALSH, J.:—I entirely agree in everything that has been said. I only want to add one word on a matter of principle about which I am satisfied that some Judges in the lower courts require serious warning. In the order under revision the learned Judge has used this language: "The award was set aside with the free consent of the parties and the court had no option in the matter but to set it aside." That is a total misunderstanding. One need not feel surprised. Judges in the lower courts are not trained in equitable jurisdiction, but nonetheless they have sometimes to exercise it. The jurisdiction of equity courts over the interests of a minor has always been considered parental, and of very solemn obligation, and a Judge sitting in an ordinary common law suit, or in a civil suit of any kind, has to exercise that jurisdiction when the facts arise and the question of a minor's consent is involved. No contract or consent order amounting to an apparent surrender or variation of an infant's rights ought to be sanctioned or listened to for one moment by any court without requiring some material

calculated to satisfy its mind, and without being satisfied, as far as it can be, on materials which are necessarily imperfect, that the proposed arrangement is *bonâ fide* intended for the benefit of the infant. In this case the learned Judge has not only utterly failed to consider that question but has used language showing that he was not aware of the duty imposed upon him.

APPELLATE CIVIL.

Before Mr Justice Muhammad Rafiq and Mr Justice Stuart

JHUNWA AND OTHERS (PLAINTIFFS) v. THE MUNICIPAL BOARD OF DHAMPUR (DEFENDANT) *

1923 *October*, 23.

Act (Local) No II of 1916 (*United Provinces Municipalities Act*), *section* 326 —*Lease of right to collect carcases of dead animals within municipal limits—Right conferred not one relating to immovable property—Suit to declare lease invalid—Limitation*

The Municipal Board of Dhampur gave a lease to *B* of the right to collect the carcases of dead animals within municipal limits. More than six months after this lease had been granted, plaintiffs sued for a declaration that the lease in favour of B was invalid and that they were the persons who were entitled to collect such carcases.

Held that the right to which the lease related was not a right appertaining to immovable property, and that the suit was barred by limitation under section 326 of the United Provinces Municipalities Act, 1916

THE facts of this case sufficiently appear from the judgment of the Court

Pandit *Uma Shankar Bajpai* (for Babu *Piari Lal Banerji*), for the appellants.

Maulvi *Iqbal Ahmad*, for the respondent.

MUHAMMAD RAFIQ and STUART, JJ. :—The two appeals, Nos. 1625 of 1920 and 32 of 1921, are connected and arise out of one suit brought by the plaintiffs appellants against the Municipal Board of Dhampur and the lessee from the Board, for a declaration that the plaintiffs appellants were entitled to collect the carcases of dead animals within the Municipal Board of Dhampur and that the lease granted by the Municipal Board to Buddhan was invalid and inoperative against the plaintiffs and should be cancelled. They further asked for damages and a perpetual injunction against the Board preventing them from issuing any fresh leases.

The learned Munsif decreed the suit.

On appeal the learned District Judge dismissed the suit on the ground that it was barred by limitation under section 326 of the Municipalities Act. There were two appeals before the

* Second Appeal No. 1625 of 1920, from a decree of Murari Lal, Additional Judge of Nagina, dated the 12th of June, 1920, reversing a decree of Mohsin Ali Khan, Munsif of Nagina, dated the 20th of September, 1919.

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learned District Judge as the Municipal Board and the lessee had filed separate appeals. Both the appeals were decreed by the learned District Judge and the plaintiffs have, therefore, preferred these two connected appeals. The point raised in both of them is the same, namely, that section 326 of the Municipalities Act does not apply to the case of the plaintiffs. The contention is that the right to collect the carcases within the Municipal bounds of Dhampur is a right relating to immovable property, while the provisions of section 326 with regard to six months' limitation apply to other actions than those relating to immovable property or any title to immovable property The learned vakil for the plaintiffs appellants contends that as soon as an animal dies and its carcase falls to the ground, the right to collect that carcase from the ground is a right relating to immovable property. We are unable to agree with his contention. The mere fact of the carcase being on the ground and being collected from the ground would not show that it is attached to the soil, or the right to collect the carcase is a right appertaining to immovable property. In our opinion the claim of the plaintiffs appellants was rightly dismissed as barred under section 326 of the Municipalities Act. The appeal, therefore, fails and is dismissed with costs.

It has been brought to our notice that there is a deficiency of court fees in the appeal of the Municipal Board filed in the lower court, which should be made good here. The decree of this Court shall not be prepared until this deficiency is made good by the Municipal Board. It will then be recoverable as costs from the opposite party.

Appeals dismissed.

Before Mr. Justice Rafiq and Mr. Justice Gokul Prasad.

1922

December, 6.

PRIYA LAL (PLAINTIFF) *v.* BODHA CHAMPA RAM AND ANOTHER (DEFENDANTS).*

Mortgage—Prior and puisne mortgagees—Purchase of mortgaged property by each in a suit to which the other was not made a party—Subsequent representative of puisne mortgagee to redeem the prior mortgage—Limitation.

A puisne mortgagee sued on his mortgage without impleading the prior mortgagee, obtained a decree for sale and in execution thereof purchased the property himself and got formal possession. The prior mortgagee then sued on his mortgage without impleading the puisne mortgagee and obtained a decree for sale and in execution thereof purchased the property himself and got possession. Further transfers then took place, and ultimately the representative of the puisne mortgagee sued the representative of the prior mortgagee to redeem the prior mortgage.

* Second Appeal No. 142 of 1922, from a decree of T. K. Johnston, District Judge of Agra, dated the 18th of July, 1921, reversing a decree of Govind Sarup Mathur, Subordinate Judge of Agra, dated the 9th of June, 1920.

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PRIYA LAL v. BOLERA CHAMPA RAM

Held that (the puisne mortgagee not having been impleaded in the prior mortgagee's suit for sale) the plaintiff, as his representative, had sixty years within which to sue for redemption. On the facts he was not barred by limitation and was entitled to the decree asked for. The principle of *Babu Lal* v. *Jalshi* (1), applied.

THE facts of this case are fully set forth in the judgment of the Court.

Munshi *Narain Prasad Asthana*, for the appellant.

Pandit *Uma Shankar Bajpai*, for the respondents.

REVES and GOKUL PRASAD, JJ. :—The facts which have given rise to this appeal are as follows:—Daya Ram made a mortgage of two properties to Jia Lal, now represented by the defendants, on the 1st of October, 1875. He made a second mortgage of one of the properties to Durga Prasad, now represented by the plaintiff, on the 8th of September, 1877. On the 28th of November, 1878, Durga Prasad sued on his mortgage, without impleading Jia Lal, the prior mortgagee, and obtained a decree for sale. In execution of this decree he purchased the property on the 20th of June, 1879, and on the 29th of July, 1891, he obtained formal possession.

On the 15th of March, 1889, Jia Lal, the prior mortgagee, brought a suit on his mortgage, but did not implead the puisne mortgagee, Durga Prasad, in the suit. He obtained a decree and in execution of his decree purchased the property on the 20th of February, 1891, and, later on, obtained possession. The position of affairs on that date was that the prior mortgagee had purchased the property without impleading the puisne mortgagee auction purchaser, and thus the rights of the puisne mortgagee, Durga Prasad, to redeem the prior mortgage of Jia Lal remained unaffected. In other words, the title obtained by the two auction purchasers remained defective. Jia Lal was liable to be redeemed by Durga Prasad, and Durga Prasad was under a liability to pay off Jia Lal before he could obtain an absolute title to the property.

On the 5th of June, 1916, Durga Prasad made a gift of the property to Priya Lal, plaintiff, and on the 23rd of January, 1919, Jia Lal's son, Champa Ram, sold the property to Babu Lal. The present suit was then brought by Priya Lal, the representative of the puisne mortgagee, to redeem the prior mortgage of 1875 against Babu Lal, the representative in interest of the prior mortgagee auction purchaser. He further claimed mesne profits on the ground that the mortgage had been satisfied by the usufruct. The defence pleaded was

(1) (1916) 14 A. L. J., 1146.

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that the plaintiff had no subsisting right to possession. It was also contended that Durga Prasad had no right to sue without payment of the prior mortgage and therefore the decree of Durga Prasad was altogether null and void, and that the present suit was barred by time. They claimed the entire amount of the morigage and interest and contended that the claim for mesne profits was improper. Babu Lal defendant further pleaded that he and his predecessor had been in adverse possession for more than twelve years and the claim was barred by twelve years' adverse possession. He denied the liability to pay mesne profits and contested the correctness of the amount claimed by the plaintiff.

The learned Subordinate Judge, before whom the case came on for hearing, decreed the plaintiff's claim for redemption on payment of the amount due but dismissed the claim for mesne profits. The defendant Babu Lal went up in appeal and the learned District Judge has allowed the appeal and dismissed the plaintiff's claim as being barred by time.

The plaintiff comes here in second appeal and his first contention is that the suit is not barred by time, because the plaintiff being no party to the suit by the prior mortgagee, the decree in that suit is not binding on him and his right to redeem the prior mortgage had not ceased to exist, and the relationship of a puisne mortgagee and a prior mortgagee still subsists between them, and as such the plaintiff is entitled to redeem the prior mortgage and thus to remove the defect in his title to the property. This point has not been the subject of any direct decision, but on principle we think that the plaintiff is right. We have been referred to several cases in this connection, but the case which seems to be most in point is the case of *Babu Lal* v. *Jalakia* (1). That was a converse case. In that case there was a contest between two auction purchasers in execution of mortgage decrees, to none of which the other mortgagee was a party. The suit was by the purchaser in execution of the prior mortgage decree to compel the defendant to redeem his prior mortgage, and, in case of default by the defendant to do so, for possession of the property The matter has been fully discussed in the judgments pronounced in that case and we cannot do better than to refer to the discussion of this question by LINDSAY, J., at page 1156 of the report: "It seems clear to me that the rights of the parties are not to be determined solely upon a consideration of

(1) (1916) 14 A. L. J., 1146.

the rights which accrued to the first and second mortgagees under their respective mortgages. In each case there has been a decree on the mortgage followed by a sale of the property and in each case the parties have by virtue of their respective purchases obtained qualified titles to the property, the nature of which must be examined for the purpose of awarding possession. It is, I think, impossible to ignore the fact that these sales have taken place and to deal with the matter in issue as if they had not in fact occurred. The title of either party is immediately traceable to his purchase in execution, and reference to the rights under the mortgages is only necessary for the purpose of ascertaining the equities existing between them; each has an imperfect title acquired by purchase and we have to determine which has the stronger equity in his favour. As for the title of the plaintiff it cannot, I think, be argued that she acquired nothing under her purchase. It will not, I imagine, be denied that had she joined the subsequent mortgagee as a defendant in her suit, she would by her purchase have acquired an absolute title to the property including the right to possession. To what extent then is her title defective by reason of her omission to implead the puisne mortgagee? Only to the extent that her title as owner is qualified by the right of redemption which was vested in the second mortgagee and which has now passed to the appellant as purchaser under the decree obtained on the second mortgage.

"That is the only right which the second mortgagee could have enforced against her as prior incumbrancer, for the right of the subsequent mortgagee to bring the equity of redemption to sale to satisfy his claim is a right which is exercised against the mortgagor only. The right of the first mortgagee to have the property sold is in no way affected by the second mortgagee's right of sale. As between the first and second mortgagees (or their representatives) the only right of the latter is one of redemption.

"As for the title of the auction purchaser under the second mortgage, that, too, is circumscribed by the liability to redeem the earlier mortgage. The title could only become absolute by a discharge of the prior incumbrance."

As we have already stated, the relationship of mortgagor and mortgagee still subsists between the parties and there is no rule of law which prohibits the suit for redemption. The question of twelve years' rule of limitation does not arise.

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Article 148 of the Limitation Act of 1908 provides a period of sixty years for a suit against a mortgagee to redeem or to recover possession of immovable property mortgaged, and the present suit is such a suit. In our opinion the decree of the court of first instance was a right decree and should not have been disturbed. We therefore allow this appeal, set aside the decree of the lower appellate court and restore that of the court of first instance with costs in all courts.

Appeal allowed.

REVISIONAL CRIMINAL.

Before Mr. Justice Stuart.

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December, 6.

EMPEROR v. ALLU.*

Act No. XLV of 1860 (Indian Penal Code), section 228—Impertinent threat by accused to witness in box.

An accused person who, during the hearing of a case, makes an impertinent threat to a witness in the box, commits an offence under section 228 of the Indian Penal Code.

THE facts of the case are thus stated in the order of the Sessions Judge referring the matter to the High Court :—

"This is an application for revision by Allu against his conviction under section 228 of the Indian Penal Code. I accept the facts found by the court below as correct, and they were as follows :—Allu was on his trial before a third class Special Magistrate, while Gendan Lal was being examined as a prosecution witness. Allu appears to have had reason to believe that the witness was turning so often towards the complainant possibly for some inspiration. Allu, at first, objected, but when he found the witness resorting the same trick, Allu, addressing the witness, said that he (Allu) would pull his ears. This is all that happened and which is said to constitute the offence of contempt of the court. Even the trial court has found that there was no intention to insult the presiding officer, but inasmuch as this conduct of this accused had the effect of the Special Magistrate starting *suo motu* proceedings under section 228, that has been taken to amount to an interruption to the public servant while sitting as a court. The facts speak for themselves and hardly need any comment. In my humble opinion, they do not constitute any interruption offered to the Special Magistrate himself. If upon this unusual expression used by the accused the court considered himself called upon to take notice of it as a matter of his duty, it cannot be said that it amounted to an *interruption by the accused himself*. I, therefore, regret to have to note that, in spite of the fact that Allu expressed his regret and apologized to that Special Magistrate, he was sent up, under custody, and kept in *hawalat* for some days, and, to cap it all, he has now been fined Rs. 5. I, therefore, beg to report this case to the Honourable High Court with the recommendation that his conviction may be quashed. Any explanation which the Magistrate may deem proper to submit will be forwarded to the Honourable High Court."

THE parties were not represented.

STUART, J. :—The learned Sessions Judge has misapprehended the scope of the section. An accused person who, during the hearing of a case, makes an impertinent threat to a witness in the box, has clearly committed an

* Criminal Reference No. 632 of 1922

offence under section 228. I refuse to interfere and return the papers.

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Application disallowed.

APPELLATE CIVIL.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji

KANNU MAL AND ANOTHER (PLAINTIFFS) *v.* INDARPAL SINGH AND OTHERS (DEFENDANTS).*

1922 *December, 7.*

Act No IV of 1882 (Transfer of Property Act), sections 83, 84 and 108 —Mortgage—Deposit of mortgage money—Procedure necessary when mortgagee is a minor

Held, on a construction of sections 83 and 84 of the Transfer of Property Act, 1882, that it is the duty of a mortgagor, in cases where he is dealing with a minor mortgagee, to take all steps which are necessary to procure the appointment of a guardian *ad litem*. In a case like this the mortgagor must apply to the court and must bring before the court some person who is willing to act as guardian, or, failing that, he must satisfy the court, in whatever way he can, that there is no person to his knowledge who is willing to accept the duties of a guardian. In that case he can ask the court to take action under order XXXII, rule 4, of the Code of Civil Procedure. *Pandurang Babu Parab* v. *Mahadaji Moreshwar Gokhale* (1), referred to.

THIS was an appeal under section 10 of the Letters Patent from the judgment of LINDSAY, J., agreeing with the judgment of the court of first appeal in a case reported in I. L. R., 44 All , 102. The facts of the case are stated in the judgment under appeal and also in the judgment of the present Bench.

Babu *Durga Charan Banerji*, for the appellants.

Babu *Piari Lal Banerji*, for the respondents.

MEARS, C. J. and BANERJI, J. :—This appeal, under the Letters Patent, has been brought in consequence of a difference of opinion between two learned Judges of this Court. The suit was instituted by the plaintiffs to recover money due upon their own mortgage and to redeem an earlier mortgage. The controversy before us relates to the claim for redemption of the earlier mortgage. The mortgage in favour of the plaintiffs was made on the 7th of September, 1913, and it provided that the mortgagee should withhold, out of the consideration for the mortgage, Rs. 2,425 payable upon an earlier mortgage of 1910. On the 24th of September, 1913, the present plaintiffs made an application to the court under section 83 of the Transfer of Property Act, and offered to deposit Rs. 2,425 mentioned above as the amount due to the prior mortgagees. The actual deposit was made the following day. Two of the

* Appeal No. 164 of 1921, under section 10 of the Letters Patent.

(1) (1902) I. L. R., 27 Bom., 33.

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mortgagees happened to be minors, and an application was made to appoint a guardian *ad litem* to the minors. Notice could not be served and various steps were taken and the matter was prolonged till the 15th of May, 1914, when the father of one of the minors was appointed his guardian *ad litem*. The mortgagees refused to withdraw the money deposited, on the ground that it was not sufficient to discharge the mortgage. After this the plaintiffs did nothing until they instituted the present suit in 1919.

The question which was raised in that suit was whether interest should have ceased from the date of the deposit on the 25th of September, 1913. On this point the lower courts differed in opinion. The lower appellate court held that additional interest was payable and interest did not cease from the date of the deposit. Upon second appeal to this Court the learned Judges, before whom the case came (LINDSAY and STUART, JJ.), differed in opinion; the former held that the view taken by the court below was correct.

We have considered the matter and we agree with the view taken by Mr. JUSTICE LINDSAY. Section 84 provides that, in the case of a deposit made under section 83, interest shall cease from the day on which the mortgagor has done all that has to be done by him to enable the mortgagee to take the amount out of court. Where the mortgagee is a person who is unable to draw the money out of court, it is necessary that a guardian *ad litem* should be appointed and, therefore, unless such a guardian was appointed, it cannot be said that the mortgagor had done all that was necessary for him to enable the mortgagee to draw the money. Where the mortgagee happens to be a person incapable of entering into a contract, section 103 lays down the mode in which the mortgagor has to act in order to enable the mortgagee to take away the deposit made in court. According to the provisions of that section, in the case of such a mortgagee, the mortgagor has to apply to the court to have a guardian appointed in the manner provided for in chapter XXXI of the Code of Civil Procedure, which now corresponds to order XXXII of the present Code of Civil Procedure. Under that order the court may appoint a guardian for the suit upon application made by the plaintiff or by the guardian. In a case like the one before us it was the duty of the present plaintiffs, who stood in the shoes of the mortgagors, to apply to the court to have a guardian appointed, inasmuch as no one could withdraw the deposit on behalf of

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the minors unless there was a guardian appointed by the court. It seems to us that the mere fact of making an application would not enable any one to withdraw the money on behalf of the minors unless a person was appointed guardian *ad litem* by the court. It was, therefore, incumbent on the mortgagor, or his representative, to see that a proper guardian was appointed by the court. It seems to us that section 103 was intended to provide for preliminary proceedings to be adopted by a mortgagor before making a tender or a deposit, and it could not have been the intention of the section that the mere making of an application would be sufficient, but that there should be a person appointed by the court to whom a tender could be made, or by whom a deposit could be taken out of court.

The question was thoroughly considered by the Bombay High Court in the case of *Pandurang Babu Parab* v. *Mahadaji Moreshwar Gokhale* (1) and we agree with much of what was said by the learned CHIEF JUSTICE in that case. Mr. JUSTICE STUART, in his dissentient judgment, refers to the fact that, in some cases, considerable inconvenience might arise by reason of a proposed guardian improperly refusing to act as guardian. If such a case arises, it will be in the power of the court to appoint an officer of the court as guardian *ad litem* with effect from the date on which the proposed guardian improperly refused to act on behalf of the minor, and in that way the inconvenience, which repeated refusals by proposed guardians might cause, may satisfactorily be remedied. When a guardian has been appointed by the court, it should be open to the person making a deposit of the mortgage money, to pay up the difference of interest between the date of the original deposit and the date of the appointment of the guardian, and in a case where such a deposit has been made, and the full amount has been deposited on the date of the appointment of a guardian, further interest on the principal amount of the mortgage should, under the provisions of section 84, cease. Our attention has been drawn to the case of *Sheo Saran Chaudhri* v. *Ram Lagan Das* (2), decided by Mr. JUSTICE LINDSAY and Mr. JUSTICE STUART. In that case an application was made under section 83 of the Transfer of Property Act, and the court was asked to issue notice to the mortgagee, who was a minor under the guardianship of his father. It was held that the application was irregular inasmuch as no

(1) (1902) I. L. R., 27 Bom., 23
(2) (1921) I. L. R., 44 All., 64.

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application to have a guardian appointed under section 103 had been made, and that it was not sufficient merely to state in the application under section 83 that the mortgagee was a minor under the guardianship of his father and leave it to the court to take steps to appoint a proper person to represent the minor. Agreeing, as we do, with the opinion of Mr. JUSTICE LINDSAY, we must dismiss the appeal with costs.

Appeal dismissed.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

1922 *December*, 15.

AJUDHIA PRASAD (DECREE-HOLDER) v. GOBIND PRASAD (JUDGMENT-DEBTOR).*

Pre-emption—Decree conditioned on payment of money to the defendant through the court if not personally—Money paid into treasury, but court not asked to notify the payment to the defendant.

Where as a condition precedent to his obtaining possession of property under a decree the plaintiff had to pay a certain sum to the defendant either directly or through the court before a date fixed, it was *held* that the plaintiff had not sufficiently complied with the terms of the decree when he paid the money due into the treasury to the credit of the defendant, but did not inform the court that he had done so, nor ask the court to serve notice of the payment on the defendant.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. *Surendra Nath Sen*, for the appellant.

Dr. *S. M. Sulaiman*, Munshi *Jang Bahadur Lal* and Munshi *Shiva Prasad Sinha*, for the respondent.

MUHAMMAD RAFIQ and PIGGOTT, JJ. :—This is a second appeal by the plaintiff decree-holder in a pre-emption suit. The decree was on a compromise. The plaintiff was to pay to the defendant vendee, within thirty days, a specified sum. In the event of the defendant vendee refusing to accept the money when tendered, the plaintiff was given the option of depositing the sum in court. Failing such payment or deposit within the period limited, the suit was to stand dismissed. The decree was passed on the 22nd of December, 1920. On the 2nd of February, 1921, the plaintiff asked the court to execute the decree by putting him in possession of the property. On the 9th of February, 1921, the opposite party, Gobind Prasad, objected that the money had neither been paid nor tendered within the period fixed. The courts below, after taking some evidence, have held that the plaintiff Ajudhia Prasad never tendered the money to Gobind Prasad out of court, but that he did deposit it in court within the

* Second Appeal No. 831 of 1922, from a decree of Lakshmi Narain Tandon, Subordinate Judge of Basti, dated the 28th of January, 1922, confirming a decree of Banarsi Das Kankon, Munsif of Basti, dated the 24th of September, 1921.

period of thirty days limited by the decree. Both courts have held, as a question of interpretation, that this deposit was not a sufficient compliance with the terms of the decree. The appeal before us is by the plaintiff Ajudhia Prasad. If we had merely to decide the point as it has been put in the judgment of the lower appellate court, we might have felt some little difficulty; but, on an examination of the record, we are satisfied that the appeal must fail. The question as to what actually happened in the interval between the passing of the decree and the application of the 2nd of February, 1921, is a little complicated by the fact that the courts below have disbelieved Ajudhia Prasad's oral evidence as to a tender made out of court. The record does, however, establish certain facts. On the 12th of January, 1921, well within the period limited by the decree, Gobind Prasad presented to the court an application, to the effect that the plaintiff Ajudhia Prasad was present with the money which he had been required to pay, and he asked that payment might be made and a receipt handed over in the presence of the court. Upon this the court officer called for Ajudhia Prasad, but he was not to be found. The court then ordered Gobind Prasad's petition to be filed. We know also that, on that very same day, namely, the 12th of January, 1921, Ajudhia Prasad went to the treasury and there deposited, to the credit of Gobind Prasad, the money which he had been directed to pay out of court. He never informed the court that this money had been so deposited, or asked the court to issue notice to Gobind Prasad of the fact that the money was lying to his credit in the treasury. On this state of facts, it seems sufficient to say that there had not, in our opinion, been any effective compliance with the provisions of the decree. This appeal, therefore, fails and we dismiss it with costs.

Appeal dismissed.

Before Mr. Justice Rynes and Mr. Justice Gokul Prasad.

BAHADUR SINGH (DEFENDANT) v. RAM BAHADUR (PLAINTIFF) AND SRI RAM AND OTHERS (DEFENDANTS).*

1922 *December*, 19.

Estoppel—Family agreement as to the division of property left by a deceased member—Sons of a party to such agreement not allowed to dispute its validity as contrary to the Hindu law.

One *S* died in 1905, leaving him surviving two daughters and two cousins who were separated, both from him and from each other. These four persons entered into an agreement whereby they divided *S*'s property between

* Second Appeal No. 691 of 1921, from a decree of B. C. Forbes, District Judge of Pilibhit, dated the 1st of April, 1921, reversing a decree of Shambhu Nath Dube, Subordinate Judge of Pilibhit, dated the 31st of January, 1921.

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them in equal shares. One of the cousins sold his share so acquired. The other cousin died leaving three sons, who succeeded to the share of their father. On the death of one of the daughters, her husband claimed possession of her share in the property of her father, and in this he was resisted by the three sons of the deceased cousin who claimed title in themselves.

Held that the defendants, though not parties to the agreement by which the property of S was divided, yet had received the benefit of it on the death of their father and could not be permitted to question its validity. *Kanhai Lal* v. *Brij Lal* (1) and *Hardei* v. *Bhagwan Singh* (2), referred to.

THE facts of this case are fully set forth in the judgment of the Court

Dr. *Surendra Nath Sen*, for the appellant.

Babu *Saila Nath Mukerji* and Munshi *Kumuda Prasad*, for the respondents.

RYVES, J. :- This appeal raises a very difficult question of law and I have arrived at my decision with some hesitation. The facts are as follows :—

One Salig Ram died in 1905, leaving him surviving two daughters only, Musammats Krishna Kuar and Ilaichi Kuar. It is stated that he had separated in 1891 from Raghunath and Bal Gobind, his first cousins, who were brothers, and that Raghunath separated from Bal Gobind in 1895. On the death of Salig Ram in 1905 disputes arose as to the succession of his property. What exactly those disputes were is not established by any evidence on the record, but this much is certain that on the 22nd of September, 1905, about a month after the death of Salig Ram, an agreement in writing was entered into between Bal Gobind, Raghunath and the two daughters of Salig Ram as to the division of the property left by Salig Ram. That document was executed by all four and is in the following terms :—

"The aforesaid property left by Salig Ram has devolved upon us, the executants, in equal shares by right of inheritance. Besides us there is no other claimant of the property of the said deceased. Now we, all the four parties, have, with our mutual consent, divided the property left by the said deceased in equal shares . . . All the four parties shall remain in separate possession and shall be the exclusive owners thereof. Each party may have his own share separately partitioned and one party will have no objection as against the other."

This agreement was given effect to and mutation of names was made accordingly, that is to say, Musammat Ilaichi Kuar, Musammat Krishna Kuar, Raghunath and Bal Gobind each took possession of a separate one-fourth share and dealt with it as their own exclusive property. Thus we find that Raghunath Prasad sold his share and he is no party to this litigation, nor are his transferees; and on the death of Bal Gobind, in 1906, his three sons, Sri Ram, Babu Bahadur

(1) (1918) I. L. R., 40 All., 487.
(2) (1919) 24 C. W. N., 105

Singh and Ram Charan, defendants Nos. 1—3, obtained mutation of names in respect of the fourth share which Bal Gobind had acquired under the agreement and have been in possession of it ever since. This position of affairs lasted until the 7th of February, 1920, when Musammat Krishna Kuar died without issue. Thereupon a dispute arose in the mutation department between the plaintiff Lala Ram Bahadur, the husband of Musammat Krishna Kuar deceased, her sister Ilaichi Kuar and the three sons of Bal Gobind, namely Sri Ram, Babu Bahadur Singh and Ram Charan, for the entry of their names, respectively, in the place of that of Musammat Krishna Kuar with respect to her one-fourth share. The revenue court directed the entry of each set of claimants over one-third of the property left by Musammat Krishna Kuar, that is to say, it decided that Ram Bahadur was entitled to one-third, Musammat Ilaichi Kuar to one-third and the three sons of Bal Gobind to one-third.

This suit was brought by Lala Ram Bahadur to recover the two-thirds share which was entered in the names of Musammat Ilaichi Kuar and the defendants Nos. 1—3. He based his claim on the allegation that under the compromise of the 22nd of September, 1905, his wife became absolute owner of one-fourth of the property left by her father Salig Ram, and that it became her *stridhan* and, on her death without issue, he succeeded to it; he was the next heir and, as such, entitled to the property.

Musammat Ilaichi Kuar did not contest the suit, but defendants Nos. 1—3 raised several defences. Their written statement is not very easy to understand. They say:—

(1) Under the deed of partition dated the 22nd of September, 1905, the property acquired by Musammats Krishna Kuar and Ilaichi Kuar, as daughters of Salig Ram, cannot constitute their *stridhan*, nor is the same their self-acquired property. Under the Hindu law they were the owners of the entire property left by Salig Ram. They took a little less than the share under the Hindu law and gave something to the brothers of their father.

(2) Musammat Krishna Kuar died without leaving any issue. According to the Hindu law her property devolved upon her sister Musammat Ilaichi Kuar. The plaintiff is not the heir to the property in dispute under the Hindu law. His claim should be dismissed.

(3) No Hindu is competent to establish succession contrary to the provisions contained in the Hindu law and legislative enactments, and, according to the document dated the 22nd of September, 1905, plaintiff's succession under Hindu law has not been established.

(4) The document dated the 22nd of September, 1905, is based upon a clear misconception of the principles of the Hindu law. In reality there was no dispute. Neither Bal Gobind nor Raghunath Prasad had any right at that time. The plaintiff has misinterpreted the aforesaid document. It has no effect against the succession under the Hindu law.

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The trial court dismissed the suit. On appeal, however, the lower appellate court decreed it, holding that the compromise of the 22nd of September, 1905, was a settlement of a family dispute and, as such, was binding upon the parties. Babu Bahadur Singh alone has appealed, and two main grounds have been strenuously urged on his behalf. Firstly, that the agreement of the 22nd of September, 1905, cannot be regarded as a settlement of a family dispute such as has been upheld on many occasions by the Privy Council, and, secondly, that the defendants, being no parties to the compromise, are entitled to set up their claim as reversioners and that they do not claim as such through their father Bal Gobind, but independently

On the first point, having regard to the evidence on the record it may be that this agreement was not a settlement of a family dispute recognized as such by the Privy Council. It is manifest, on the face of it, that the settlement arrived at in 1905 and given effect to was one wholly unjustified by Hindu law. If Salig Ram was separate from his cousins, then his two daughters were undoubtedly his heirs and were entitled to succeed to his property. If Salig Ram was joint with his two cousins, then they would be entitled to succeed by survivorship and his daughters would be entitled to maintenance only. The position would be further complicated if Raghunath and Bal Gobind were separate from each other. But, whatever was the actual state of facts, the two daughters and Raghunath and Bal Gobind could not possibly be entitled to proprietary rights in a one-fourth share each. However, in the view I take, it is unnecessary to decide this question; and I rely, for the view I have taken, on two recent decisions of the Privy Council, namely, *Kanhai Lal* v. *Brij Lal* (1) and *Musammat Hardei* v. *Bhagwan Singh* (2).

It seems to me that although defendants Nos. 1-3 (including the appellant) were no parties to the partition of 1905, nevertheless since 1906, on the death of Bal Gobind, their father, who was a party to it, they have been in possession of the share which Bal Gobind acquired under that partition and to which he would not have been otherwise entitled, ever since, that is for over fourteen years. They have taken the place of their father and have enjoyed possession of the property in succession to him, and I, therefore, hold that they are

(1) (1918) I. L. R., 40 All., 487.
(2) (1919) 24 C. W. N., 105.

now estopped. It must be noted that as Ilaichi Kuar is still alive, even according to their own written statement, they have no present valid claim under Hindu law to the one-fourth share of Salig Ram's property, and if Raghunath, who is also alive, was also separate from Bal Gobind, may never have a legal claim. In *Kanhai Lal* v. *Brij Lal* (1) a similar argument was raised, but it was held that as under the compromise Kanhai Lal had obtained a substantial benefit which he had hitherto enjoyed, he was bound by it and could not now claim as a reversioner, though he was no party to the compromise in that case. Similarly in the case of *Musammat Hardei* v. *Bhagwan Singh* (2) their Lordships of the Privy Council held: "Whether this arrangement is binding on the grandsons cannot be determined in this suit, and on that question their Lordships express no opinion, but the plaintiff, at all events, is bound by her own agreement; and in view of this fact, and of the favour shown by courts to family arrangements and the long period of time which has elapsed since the arrangement was made, she cannot now be allowed to repudiate the agreement." It is quite clear that one of the grounds, if not the main ground, for their decision was that the plaintiff, being a party to the agreement, could not be allowed to repudiate it. Here, although the defendants were no parties to the agreement, their father was, and, on his death, they adopted it and obtained possession of the property which had come to their father under the agreement and were in possession of it for over fourteen years, and, even now, they do not repudiate it. They wish not only to hold what they got under that agreement but, at the same time to go behind that agreement and claim as reversioners (*vide* their written statement). In my opinion they are estopped from so doing. I would dismiss the appeal with costs.

GOKUL PRASAD, J.—I agree.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Walsh.

EMPEROR v. HORI LAL.*

Act No. XLV of 1860 (Indian Penal Code), section 420—Breach of trust—Act (Local) No. II of 1916 (United Provinces Municipalities Act), sections

1922 December, 20.

* Criminal Revision No. 587 of 1922, from an order of H. N. Wright, Sessions Judge of Bareilly, dated the 6th of November, 1922.

(1) (1918) I. L. R., 40 All., 487.

(2) (1919) 24 C. W. N., 105.

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116, 200, 273, 274—*Scavenging undertaken by a municipal board through "customary sweepers"—Rubbish and night soil collected by the sweepers becomes the property of the board.*

Where a municipal board undertakes house scavenging by means of "customary sweepers," the rubbish and night-soil collected by the sweepers is the property of the board. Hence where a sanitary inspector, having induced the sweepers to deposit the matter collected by them in a place other than that prescribed by the board, thereafter sold it for his own benefit, it was *held* that he was rightly convicted of criminal breach of trust.

THE facts of this case are fully set forth in the judgment of the Court.

Mr. *Nihal Chand*, for the applicant.

The Assistant Government Advocate (Mr. *R. Malcomson*) for the Crown.

WALSH, J. :—The history of this matter has been very ably set out in the admirable and thorough judgment of M. Mushtaq Ali Khan, Magistrate, first class, of Bareilly who tried the original case. The applicant before me has been convicted of selling night-soil as Sanitary Inspector of the Pilibhit Municipality, and while it was his duty, as such Sanitary Inspector, to see that the work of transport and deposit of the night-soil was properly done, he is alleged to have sold three cartloads for about Rs. 200 in all, and the mere statement that a Sanitary Inspector of a municipal board could do that, behind the back of his employers, and pocket the money, without committing a criminal offence, is calculated, at first sight, to cause surprise. One substantial point, however, has been ably argued on his behalf in revision, as to whether the night-soil which this man sold could be described, in any way, as the property of the municipal board who are the complainants, so as to constitute an offence under section 409 of the Indian Penal Code. At the time in question the Pilibhit Municipality had been going through a crisis with their sweepers, though, according to the Magistrate, the prosecution of the Sanitary Inspector seems to have put an end to the trouble. The sweepers in this municipality are a class of persons recognized by the Municipalities Act as house scavengers or customary sweepers with a customary right to do house sweeping. It appears, further, that they had entered into an arrangement with the municipality for disposing of the night-soil, which they had the right to collect, in accordance with the municipality's directions, at a price which ultimately reached something like Rs. 2-8-0 per 100 donkey-loads. I have been referred to two annual reports of the municipality, signed by their Secretary and

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Chairman, for 1919 and 1922, respectively, in which this arrangement is set out in a summary form in a schedule to be submitted to the Sanitary Commissioner, and is therein described as a sale by these sweepers, and a purchase by the municipality, and it must be conceded to Mr. *Nihal Chand*, who argued on behalf of the applicant, that if this is the correct description, the point on which he urged this Court to interfere would be a good one. Whether it would be a complete answer to the case is a matter to which I will refer hereafter, but my view is that it is a fallacy to describe it as a mere sale. In my opinion it is more properly described as an arrangement by which the municipality undertakes to collect all night-soil and refuse from private houses, through the instrumentality of the customary sweepers, for a reward arranged by contract between them from time to time. It is an extremely narrow view to take, to cut up, so to speak, each day's work of the removal of night-soil into a series of independent transactions of mere sale, and the opinion which I have formed that this legal definition does not really answer the test, becomes much stronger when the provisions of the Act are carefully examined.

Section 116 of the Act, particularly sub-sections (*a*) and (*d*), vests in the municipality the care of night-soil deposits, and also of rubbish and night-soil collected by the board from houses. Mr. *Nihal Chand's* argument is that it is not collected by the board but is collected by the customary sweepers, who can do what they like with it, until they actually transfer it to the municipal rubbish heap by an act of bargain and sale, which presumably takes place by night in a series of somewhat unsavoury transactions. Up to a point this view is, of course, correct. If there were nothing to the contrary, and the Act protected the sweeper, as it undoubtedly does, in the exercise of his customary right to collect this stuff, he would be, when he left the owner's premises from which he took it, presumably the sole owner and free to do with it as he liked. His rights in this regard are protected by section 200 which prohibits the municipality, which may otherwise undertake house scavenging, from undertaking it without the consent of the sweeper in any particular house over which that sweeper enjoys the customary right. But this right has its correlative duty, naturally enough in a matter so important to public health, and a customary sweeper who does not collect, or fails to perform the house scavenging in a proper way, is not only

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liable to be fined, but may have his customary right forfeited by the Magistrate. The question, therefore, arises: what is he to do with it? He is interested in collecting it if he can get rid of it, but he cannot lawfully refuse to collect. He may no doubt sell a portion of it if he can get a purchaser, or deposit it in a legitimate place, because his arrangement with the municipality does not tie him down to a definite quantity in the supply which he is to bring to the deposit each night. But at this stage two important sections of the Act come into operation. By section 273 the board may, amongst other things, appoint a place for the disposal of the night-soil (and in this particular case they had done so) and they may give directions as to the time, manner and conditions subject to which any offensive matter may be deposited, and they must appoint a place inside municipal limits, unless they get the previous sanction of the District Magistrate. Any occupier of land whose night-soil is deposited otherwise than in a place appointed under section 273, or any person (which, of course, includes a customary sweeper) contravening any direction of the board under clause (c) of section 273, is made liable to a fine by section 274. So that if the sweepers in pursuance of a strike, or as suggested by Mr. *Nihal Chand*, attempted to make arrangements with a private person to deposit night-soil outside municipal limits, which involves obtaining the consent of the municipality, they would experience very considerable difficulty in making any substantial or satisfactory arrangement. No municipality, I suppose, would seriously attempt to prevent a small sale to some person who for his own convenience wanted a ready transaction with a sweeper in this sort of stuff. But subject to that, if the municipality does its duty, the sweepers, if they decline to enter into an arrangement with the municipality, or having entered into it, proceed to break it, or, in other words, to strike, would soon find themselves in a great difficulty because they must deposit the stuff somewhere. They cannot deposit it under any permanent arrangement in a place not sanctioned by the municipality without committing an offence, and if they deposited it at casual places, they would be committing a series of offences against other sanitary provisions of the Act, or committing nuisances, besides risking the loss of their livelihood. So that it seems to me that if a strike took the very worst form of refusal altogether by the sweepers to have anything to do with the municipality, it would, if the municipality did their duty, end in all the sweep-

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ers finding themselves in jail before the district was visited by a serious epidemic, and I have no doubt that that was the scheme intended by the Legislature. That is to say, the sweepers are, in practice, forced into the hands of the municipality. The board may only undertake the house scavenging subject to the rights of the customary sweepers, and this board has undoubtedly done so. But the provisions as regards breaches of the directions of the board for depositing contain no exception in favour of the customary sweepers.

The sweepers being forced, as I have said, into the hands of the municipality (and, of course, in nine cases out of ten this is the natural body with whom the customary sweepers would seek to make an arrangement), when an arrangement is once made and the sweepers undertake to transport and deposit at the given place this night-soil at a given rate, the municipality has, in my opinion, undertaken house scavenging with the consent of the customary sweepers, and, therefore, the rubbish and soil collected from houses is collected by the board from that moment within the meaning of section 116. I think this view is borne out by the use of the language to which I have referred in section 200. The consent of the sweeper is given when he enters into an arrangement with the municipal board.

To my mind this is an answer to the rather formidable point which was raised in argument. Even if I had been compelled to hold that the point was a sound one, I am not sure that it would have been an answer to this case. The finding is that the Sanitary Inspector, well knowing the proper place for deposit, and taking advantage of the fact commonly known that there was a war between the sweepers and the municipality and that the sweepers were taking their stuff elsewhere, used his authority with the sweepers to deposit the stuff at an unauthorized place and proceeded to sell it. A servant acting within the scope of his employment cannot, in order to defraud his master, set up a breach of his master's regulations in his own favour, and it must be taken, I think, that in any case when this night-soil was deposited at an unauthorized place, the Sanitary Inspector still held it there at the disposition of his employers and that if he chose to sell it, the money would belong to his employers, and to appropriate it to his own use would be a breach of trust. However, I propose to decide it on the first point.

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The question of sentence was taken into account in the very able judgment of the Magistrate who tried the case. I agree with what he says. It is an abuse of a position of trust by an educated man who ought to set an example to those under him. I assume that it is his first offence, though I have always a suspicion, when a public servant is caught in this sort of thing, that it is not the first time and that he has not deserved the reputation which his position gives him. Of course a man could not get such a position and would not be able to commit this class of fraud if he had not originally a good character. There is reason to fear that the public, at any rate, are far from being edified by exhibitions of breach of trust by persons in favoured positions who afterwards seek to escape the well-merited punishment which an ordinary thief receives. On the other hand, as the Magistrate has said, "while the offence is a serious one and demands a severe sentence, having regard to Hori Lal's antecedents, I content myself with passing a fairly light sentence on him." I see no reason to interfere. The application is rejected. The applicant must surrender to his bail and serve the rest of his sentence.

Application rejected.

APPELLATE CIVIL.

Before Mr Justice Muhammad Rafiq and Mr. Justice Piggott.

1922 December, 21.

AMBIKA PRASAD AND ANOTHER (DECREE-HOLDERS) *v.* JHINAK SINGH AND ANOTHER (OBJECTORS) *

Civil Procedure Code, order XLI, rule 4—Decree—Suit by three plaintiffs jointly—Suit dismissed—Appeal by one plaintiff decreed in favour of all in ignorance of the death of one of the non-appealing plaintiffs.

A suit for pre-emption was filed by three persons jointly in respect of three-fourths of the property sold. The court of first instance found that the custom of pre-emption, which was set up as the basis of the claim, was not proved, and accordingly dismissed the suit. One of the plaintiffs appealed. He stated that he was appealing on his own behalf and on behalf of the other two co-plaintiffs, but he did not make the latter parties to his appeal. On this appeal the lower appellate court reversed the decree of the first court and passed a decree in favour of the three plaintiffs jointly. At the time of passing this decree, however, one of the non-appealing plaintiffs was dead.

Held that the decree so passed was a nullity and incapable of execution. *Balaram Pal* v. *Kangsha Majhi* (1), referred to.

THE facts of this case are fully stated in the judgment of the Court.

Dr. *Surendra Nath Sen*, for the appellants.

* Second Appeal No. 329 of 1922, from a decree of E. L. Norton, First Additional Judge of Gorakhpur, dated the 23rd of January, 1922, reversing a decree of Gangadhar Pant, Munsif of Bansgaon, dated the 27th of June, 1921.

(1) (1919) 53 Indian Cases, 548.

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Pandit *Narmadeshwar Prasad Upadhya*, for the respondents.

MUHAMMAD RAFIQ and PIGGOTT, JJ. :—The three execution appeals, Nos. 329, 330 and 271 of 1922, arise out of two pre-emption decrees passed by the lower appellate court on the 9th of April, 1921. It appears that one Damri Singh executed a deed of sale on the 20th of May, 1919, in respect of a portion of his landed property, in favour of Jhinak Singh and Udit Narain Singh. On the 18th of May, 1920, and the 21st of June, 1920, respectively, two suits were instituted by two sets of plaintiffs, the co-sharers of Damri Singh the vendor, for the recovery of possession of the property conveyed by the sale-deed of the 20th of May, 1919, on the ground of pre-emption. Ram Baran was the plaintiff in one suit and Ambika Prasad, Ram Charittar Singh and Hubedar Singh were the plaintiffs in the second suit. The vendees resisted the claim by the denial of the custom of pre-emption set up in the two plaints. The learned Munsif, in whose court the two suits were filed, came to the conclusion, on the evidence in the case, that no custom of pre-emption prevailed in the village where the property in question was situate. He accordingly dismissed the two claims.

Two appeals from the two decrees of the Munsif were preferred to the district court. Ram Baran preferred an appeal from the decree dismissing his suit, and the other appeal was preferred by Ambika Prasad alone. He, however, stated that he was appealing on his own behalf and on behalf of his two co-plaintiffs, namely Ram Charittar Singh and Hubedar Singh, though he did not make them respondents in the appeal. The two appeals were heard and disposed of together by the learned District Judge, on the 9th of April, 1921. He disagreed with the court of first instance and found that the custom of pre-emption obtained in the village and decreed the two appeals. In the case of Ram Baran the decree was that he should pay one-fourth of the sale consideration within the specified period and recover possession of one-fourth of the property in suit. In the appeal of Ambika Prasad the decree was that he (Ambika) and his co-plaintiffs, Hubedar Singh and Ram Charittar Singh, should deposit three-fourths of the sale consideration within the period specified in the decree and recover three-fourths of the disputed property.

The decree-holders in the two appeals deposited their respective amounts of consideration money within the pres-

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cribed period and were duly put in possession of the disputed property in proportion to the shares decreed to them.

Subsequently two applications were made by the judgment-debtors, i.e., the vendees, to the court of the Munsif who had executed the two decrees, asking for restitution of the property on the allegation that the decrees that had been executed were incapable of execution for the reason that Hubedar Singh had died prior to the passing of the decrees by the learned District Judge on the 9th of April, 1921, in the appeals of Ram Baran and Ambika Prasad. The learned Munsif allowed the request of the judgment-debtors to this extent that he restored one-fourth of the property to them, i.e., the share of Hubedar Singh. The judgment-debtors preferred two appeals on the execution side to the court of the learned District Judge. A third appeal was preferred by Ambika Prasad to the same court objecting to the restoration of the share of Hubedar Singh to the vendees, the judgment-debtors. The learned District Judge disposed of the three appeals together by one order. He was of opinion that Hubedar having died prior to the passing of the decree on the 9th of April, 1921, the two decrees in the appeals of Ambika and of Ram Baran were a nullity and, therefore, could not be executed. He allowed the appeals of the judgment-debtors and dismissed the appeal of Ambika Prasad.

We have, therefore, three appeals before us, two by Ambika Prasad and one by Ram Baran. We take up the two appeals of Ambika Prasad first.

It is contended on behalf of Ambika Prasad that the omission to bring to the notice of the court the death of Hubedar Singh, prior to the 9th of April, 1921, and to bring the legal representatives of Hubedar Singh, deceased, on the record does not vitiate the decrees of the 9th of April, 1921. The right to claim pre-emption was a joint right of Ambika Prasad, Ram Charittar and Hubedar Singh, and, if Hubedar Singh had not joined in the suit or if he had died prior to the passing of the decree, the right of pre-emption remained intact with Ambika Prasad and Ram Charittar. It is further urged that it was the duty of the vendees judgment-debtors to call the attention of the learned District Judge to the omission by Ambika Prasad to bring the legal representatives of Hubedar Singh on the record and to have the decree amended. The vendees could not object nor could the executing court decline to execute the decree of the 9th of April, 1921, as it stood. It

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is argued that a court executing the decree cannot go behind the decree. If there is any legal defect in the decree, it is not for the executing court to rectify it but the proper course is to ask the court which has passed the decree to amend or rectify it.

On the other hand, the argument for the vendees is that the decree against a dead person is a nullity. Further, it is said that the right of pre-emption was not a joint right of Ambika Prasad, Ram Charittar and Hubedar in the sense that if one fell out or declined to sue or died during the pendency of the suit, the right survived to the other two. Nor was it a right that was so divisible that Hubedar's share could be described as one-fourth. In any case, strong stress is laid upon the fact that the decree of the 9th of April, 1921, in the appeal of Ambika Prasad was passed after the death of Hubedar, and, therefore, it is a nullity.

In support of this contention reliance is placed on the case of *Imam-ud-din* v *Sadarath Rai* (1). That case is a converse of the present one. In that case the decree was passed by a Bench of this Court in ignorance of the fact that one of the respondents was dead. Subsequently an application was made for review and the question was raised whether the decree was a good and valid decree. It was held by two learned Judges of this Court that the decree having been passed against the respondents after one of them had been dead, it was a nullity. It might, however, be argued on behalf of Ambika Prasad, that the principle underlying that decision does not apply to his appeal inasmuch as the decree against the vendees could not be split up, as the shares of the vendees perhaps were not specified in the sale-deed. In the present case Ambika Prasad is not seeking to split up the shares of the vendees but is enforcing his right of pre-emption which he had jointly with Charittar and Hubedar against three-fourths of the disputed property. This objection is sufficiently met by another case, that of *Baluram Pal* v. *Kanysha Majhi and others* (2). This case seems to us to be absolutely in point. It was laid down there that where one of several plaintiffs prefers an appeal in which the other plaintiffs are also interested, rule 4 of order XLI of the Code of Civil Procedure does not authorize him to proceed with the appeal without making the other plaintiffs parties thereto. Further, it was laid down that the effect

(1) (1919) I. L. R., 32 All., 301.
(2) (1919) 53 Indian Cases, 542.

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of allowing an appeal to be heard and a decree passed in ignorance of the death of one of the joint plaintiffs is to render the judgment and decree a nullity. We, therefore, are of opinion that the decree in favour of Ambika Prasad, Ram Charitar and Hubedar, having been passed after Hubedar had died, was a nullity and was not capable of execution. The vendees are entitled to be restored to the three-fourths of the disputed property. The appeals of Ambika Prasad, therefore, fail and are dismissed with costs.

The appeal of Ram Baran stands on quite a different footing. He had brought a separate suit in the court of the learned Munsif, and, on his claim having been dismissed, had preferred a separate appeal. It is true that his appeal and that of Ambika Prasad were heard together and disposed of by one and the same judgment by the learned District Judge, but he was decreed one-fourth share of the disputed property on the payment of one-fourth of the sale consideration. He had mentioned in his memorandum of appeal that Hubedar was dead and he was going to bring the legal representatives of Hubedar on the record as respondents in the case. Hubedar was merely a *pro formâ* defendant in the suit in the court of the Munsif and, in the appeal of Ram Baran, Hubedar would still have been a *pro formâ* respondent. The omission by Ram Baran to bring the legal representatives of Hubedar on the record as respondents to his appeal would not affect the merits of his appeal. We, therefore, think that any illegality in the decree of Ambika Prasad would not affect the decree in favour of Ram Baran. The order of the learned District Judge allowing restoration to the vendees in respect of the share decreed to Ram Baran, i.e., one-fourth of the disputed property is erroneous. We, therefore, allow the appeal of Ram Baran with costs and set aside the order of the learned District Judge with regard to Ram Baran's share.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

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December, 23.

SADIQ ALI (DEFENDANT) *v.* ABDUL BAQI KHAN (PLAINTIFF) AND ABDUL KARIM (DEFENDANT).*

Muhammadan law—Pre-emption—Talab i mawasibat—No reference to talab i ishtishhad—invalidity of demand.

Where a claim for pre-emption is based on the Muhammadan law, if the pre-emptor in making the second demand omits to call the attention of

* Second Appeal No. 1372 of 1919, from a decree of Muhammad Husain, District Judge of Cawnpore, dated the 17th of June, 1919, reversing a decree of Kshirod Gopal Banerji, Subordinate Judge of Cawnpore, dated the 22nd of April, 1919.

the witnesses to the fact that he had already made the first demand, the second demand is not valid, even although the witnesses to both demands may be the same *Mubarak Husain* v. *Kaniz Bano* (1), *Sarjug Singh* v *Jagmohan Singh* (2), and *Rajnb Ali Chowdhar* v. *Chunda Churn* (3), referred to. *Muhammad Usman* v *Muhammad Abdul Ghafur* (4), distinguished.

THE facts of this case are fully set forth in the judgment of the Court.

Dr. *S. M. Sulaiman* and Dr *Kailas Nath Katju*, for the appellant.

Maulvi *Iqbal Ahmad*, for the respondents.

MUHAMMAD RAFIQ and PIGGOTT, JJ. :—The three second appeals, Nos. 1371, 1372 and 1373, arise out of three pre-emption suits instituted by Abdul Baqi Khan against Sadiq Ali and others, in the year 1918. Two of them were instituted in the court of the Munsif and the third in that of the Subordinate Judge.

In order to understand the pleadings in the case, it is advisable to give a pedigree of the parties to the three appeals.

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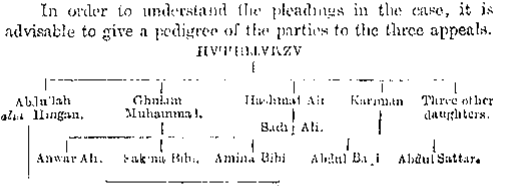

Musammat Sakina Bibi was married to Abdul Karim Khan. Some time ago, a house was purchased by Azmatullah and his son Abdullah *alias* Hingan, in equal shares. Some years afterwards, Sadiq Ali, son of Hashmat Ali, sold his interest in the house to Ghulam Muhammad. The latter also acquired the shares of his three sisters other than Musammat Kariman. In 1909 Ghulam Muhammad sued for partition against the other members of the family, whose shares he had not purchased, and obtained a decree. In 1915 Abdul Karim Khan and his sister, Hafiz-un-nissa, brought a suit for the recovery of their shares against Musammat Kariman and others. The chief defence to the suit was put forward by Abdul Baqi who was also a defendant in the case. He resisted

(1) (1904) I. L. R., 27 All., 160.
(2) (1919) 51 Indian Cases, 40
(3) (1890) I. L. R., 17 Calc., 543.
(4) (1911) I. L. R., 34 All., 1.

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the suit by pleading adverse possession. The claim was decreed by the learned Munsif on the 7th of August, 1915. On appeal, the decree of the first court was set aside on the plea that the claim was barred by the principle of *res judicata*. Thereupon Abdul Karim filed a second appeal to this Court which was admitted in November, 1915, and the case was remanded by this Court, on the 15th of November, 1918, for trial on the merits. While the second appeal was pending in this Court, Abdul Karim and his wife, Musammat Sakina Bibi, executed, on the 22nd of December, 1917, two sale-deeds in respect of their separate shares in the house mentioned above, in favour of Sadiq Ali. On the 15th of March, 1918 Anwar Ali sued to recover possession of their shares on the ground of pre-emption. The claim was brought against the vendors, Abdul Karim and Sakina Bibi, as also against Sadiq Ali, the vendee. On the 14th of May, 1918, the vendee and Anwar Ali the pre-emptor entered into a compromise, by which not only the sale-deed of the 22nd of December, 1917, was allowed to remain but Anwar Ali agreed to convey his own share also to Sadiq Ali. On the 20th of August, 1918, a decree was passed by the learned Munsif, in the suit of Anwar Ali, in terms of the compromise filed. On the 7th of September, 1918, Abdul Baqi instituted two suits on the basis of pre-emption against Sadiq Ali, namely, one in respect of the transfer made by Sakina Bibi and the second in respect of the transfer of the share of Anwar Ali under the compromise of the 14th of May, 1918, which was incorporated into the decree of the 20th of August, 1918. On the 16th of December, 1918, a third suit was instituted by Abdul Baqi against Sadiq Ali in respect of the transfer made by Abdul Karim on the 22nd of December, 1917, in favour of Sadiq Ali. Of these three suits, the suit relating to the transfer of Anwar Ali was instituted in the court of the Subordinate Judge of Cawnpore. The other two suits were filed in the court of the Munsif and were transferred to the file of the Subordinate Judge. Sadiq Ali resisted all the three suits on various grounds. The evidence for all the parties in the three suits was recorded in Anwar Ali's case and one judgment governed all the three suits. The learned Subordinate Judge, after a careful consideration of all the evidence in the case, came to the conclusion that the plaintiff's claim in all the three suits should fail. He was of that opinion, in respect of the transfers of Abdul Karim and Sakina Bibi, on the ground that the two demands required by the Muham-

madan law had never been made. In the suit of Anwar Ali he was of opinion that as the transfer was by means of a decree, no right of pre-emption could be asserted

Abdul Baqi preferred three appeals from the decree of the learned Subordinate Judge. The lower appellate court disagreed with the first court on the evidence and came to the conclusion that the two demands required under the Muhammadan law were made. The learned Judge of the lower appellate court was definitely of opinion that the first demand of the *talab-i-mawasibat* was made as soon as the plaintiff pre-emptor heard of the sales of Abdul Karim and Sakina Bibi. As to the second demand, he was also of opinion that it was made on the spot where the property transferred is situate As to the transfer by Anwar Ali, the learned Judge was of opinion that the transfer was not, properly speaking, by a decree of a court, but, in any case, in the circumstances, the plaintiff pre-emptor had the right of pre-emption. The decrees of the first court were accordingly set aside and the claim of the plaintiff pre-emptor was decreed in all the three suits.

Sadiq Ali has preferred the three appeals before us. We take up first the appeals that relate to the transfer made by Abdul Karim and his wife Sakina Bibi, on the 22nd of December, 1917. Three objections are urged on behalf of the appellant to the findings of the lower appellate court. It is urged, on behalf of the appellant, that the learned District Judge misread and misquoted the evidence of Rajjab Beg, and was not, therefore, justified in disagreeing with the first court and holding that the first demand was made by the plaintiff pre-emptor. The second objection is that, on the evidence of Rajjab Beg himself, the demand, if made, was of no value as no sale had taken place at the time the matter was reported by Rajjab Beg to the plaintiff pre-emptor. The third objection is that the second demand, on the evidence for the plaintiff pre-emptor, was an invalid demand under the Muhammadan law. The learned counsel for the appellant has cited case law in support of his second and third objections. We think it sufficient to remark with regard to the first objection that, after hearing the evidence of Rajjab Beg read, we are not prepared to agree with the contention of the learned counsel for the appellant that the lower appellate court has misread or misquoted the statement of Rajjab Beg. The learned Judge of

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the lower appellate court was quite justified in interpreting the evidence of Rajjab Beg as he has done and his finding on that point is a finding of fact which we are not permitted to disturb. We do not think that there is much force in the second objection also. It also depends upon the interpretation of the evidence of Rajjab Beg. The learned Judge of the lower appellate court has construed the statement of Rajjab Beg to mean that he reported to the plaintiff pre-emptor that a sale of the shares of Abdul Karim and Sakina had taken place. The plaintiff pre-emptor was justified on that evidence to make the first demand. It would serve no useful purpose, in view of our finding on the third objection, to discuss the case law as to when should the first demand be made, that is, whether the first demand should be made when the sale is completed under the provisions of Act IV of 1882, or when the sale, according to the intention of the parties, has been completed. We think that the third objection of the appellant must prevail. The learned District Judge has not come to a clear finding on the question whether at the time of making the second demand the plaintiff pre-emptor called the attention of his witnesses to the fact that he had already made the first demand. The finding of the lower appellate court upon this point is in the following words :—

"As regards the affirmatory demand it was urged on behalf of the respondent that it was irregular, that the witnesses who had accompanied the plaintiff appellant to the premises were not called upon to bear witness to the fact that the immediate demand had already been made. This is true so far as the evidence of the witnesses is concerned, though the plaintiff himself states that the witnesses were invoked after the second demand on the premises. Even assuming that there was no special invocation, the requirements of Muhammadan law were sufficiently complied with when the *talab-i-istishhad* was made in the presence of the witnesses in whose presence the immediate demand had been made : *Chain and others* v. *Husain Bakhsh* (1899) A. W. N., 101."

The learned counsel for the respondent pre-emptor asks this Court to consider this finding as a finding that at the time of the second demand the plaintiff had called the attention of his witnesses to the fact that he had made the first demand.

We are unable to accede to this contention. The language of the learned Judge just quoted above would not bear any such interpretation. After reciting that the witnesses had not stated that at the second demand their attention was called by the plaintiff to the first demand, the learned Judge goes on to say that the plaintiff states that he had done so. The learned Judge stops there and goes on to the consideration of the case

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from another point of view, taking it for granted that the plaintiff had not called the attention of his witnesses to having made the first demand. We are, therefore, of opinion that the learned Judge of the lower appellate court did not hold that he believed the evidence of the plaintiff pre-emptor, not only uncorroborated but against the statements of his own witnesses There were only two courses open to us, either to remand the case to the court below to get a definite finding on the question raised or to hear the evidence ourselves and record a finding. We have adopted the latter course. We have heard the evidence for the plaintiff pre-emptor read to us *in extenso* and criticized. We have no hesitation in holding that the plaintiff's statement uncorroborated by any of his witnesses cannot be believed and we do not believe it. We, therefore, hold that the second demand deposed to by the plaintiff and his witnesses was an invalid demand under the Muhammadan law.

This finding would, at first sight, dispose of the two appeals, Nos. 1372 and 1373, but the contention on behalf of the plaintiff pre-emptor is that, even assuming the omission at the second demand referred to above, the requirements of the Muhammadan law are sufficiently complied with when the *talab-i-istishhad* is made in the presence of the witnesses in whose presence the first demand was made. In support of this contention, reliance is placed on the cases of *Chotu and others* v. *Husain Bakhsh* (1) and *Muhammad Usman* v. *Muhammad Abdul Ghafur* (2). The first case was considered by several learned Judges of this Court subsequent to 1893 and was dissented from; *vide* the case of *Mubarak Husain* v. *Kaniz Bano* (3). We would also refer to the cases decided in other High Courts on the same point, namely, those of *Sarjug Singh* v. *Jagmohan Singh* (4) and *Rajjab Ali Chopedar* v. *Chundi Churn* (5). The case of *Muhammad Usman* v. *Muhammad Abdul Ghafur* (2) does not really touch upon the question under discussion. In that case it was decided that the two demands may be combined together if the vendor and the vendee are present at the time the demand is made or the demand is made on the property sold. In the present case it is not pretended that when either of the two demands was made the vendor or the vendee was present or that the first

(1) Weekly Notes, 1893, p. 101.
(2) (1911) I. L. R., 34 All., 1.
(3) (1904) I. L. R., 27 All., 160.
(4) (1919) 51 Indian Cases, 40
(5) (1890) I. L. R., 17 Calc., 543.

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demand was made on the property. We, therefore, hold that the claim of the pre-emptor fails. We allow the appeals of Sadiq Ali in respect of the transfer made by Abdul Karim and Sakina Bibi *i.e.*, we allow appeals Nos. 1372 and 1373.

The appeal No. 1371, as we have already stated above, related to the transfer made by Anwar Ali. We need not discuss the question whether any right of pre-emption accrued to Abdul Baqi because the transfer was in terms of a compromise, which compromise was embodied in the decree. Sadiq Ali, according to our decision in appeals Nos. 1372 and 1373, had acquired a good title on the 22nd of December, 1917, in the house in question. He thus became a co-sharer of Anwar Ali by virtue of his purchase of the 22nd of December, 1917. The share of Anwar Ali was not transferred till the 27th of August, 1918. Abdul Baqi's right of pre-emption is based upon vicinage. Sadiq Ali had, on the 27th of August, 1918, a better and a superior right of pre-emption to that of Abdul Baqi. The claim of the latter, therefore, with regard to the share of Anwar Ali, also fails.

We allow appeal No. 1371 also.

The result is we allow all the three appeals, Nos. 1371, 1372 and 1373 of 1919, set aside the decrees of the court below with costs to Sadiq Ali of all the courts.

Appeals allowed.

APPELLATE CIVIL.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr Justice Stuart

BHAGWATI SHUKUL (PLAINTIFF) *v.* RAM JATAN TIWARI AND OTHERS (DEFENDANTS) * 1922 November, 9.

Hindu law—Hindu widow—Alienation of property of husband—Legal necessity—Marriage of daughter—Extent to which alienation is permissible.

The provision of a dowry for a daughter is a matter of legal necessity which will justify the alienation by a Hindu widow of a larger or smaller portion of her husband's property. No hard and fast rule can be laid down as to what proportion of the property may be alienated; but where the daughter was blind and a cripple and the property was small (Rs. 600 only in value) an alienation of the whole of it was upheld. *Churaman Sahu* v. *Gopi Sahu* (1) and *Ramasami Ayyar* v. *Vengidusami Ayyar* (2), referred to.

THIS was an appeal under section 10 of the Letters Patent from the judgment of a single Judge of the Court.

The facts of the case sufficiently appear from the judgment under appeal, which was as follows:—Parmanand and Krishnanand were two brothers, separate in estate. Krishnanand died long ago leaving him surviving a widow, Musammat Mohna, whose daughter was married to Ram Jatan Tiwari, defendant No. 1. It was said by the defence that they had a son, Ram Man Tiwari, who was defendant No. 2, but both the courts have found that Ram Man was not the son of Musammat Oreha, so he can be disregarded. The plaintiff is the grandson of Parmanand. The property in suit belonged to Krishnanand. On his death his widow, Musammat Mohna, became the heir. She made a deed of gift or *shankalpnama*, dated the 23rd of August, 1904, in favour of Ram Jatan, by which she transferred to him the entire property which she inherited from her husband, with full proprietary rights. Musammat Mohna died in September, 1908. This suit was brought by Bhagwati Shukul, in 1918, to recover possession of the whole of this property on the ground that the gift by Musammat Mohna to her son-in-law was invalid after her life.

Various defences were raised, but the only one that need be considered for the purposes of this appeal was that the gift under the circumstances was justified.

The trial court found that Musammat Oreha was blind and a cripple and that in order to get her married it was necessary to supply her with a handsome dowry. It held, therefore, that there was legal necessity for the gift, but only to the

* Appeal No. 85 of 1922, under section 10 of the Letters Patent.

(1) (1909) I. L. R., 37 Calc., 1.
(2) (1898) I. L. R., 22 Mad., 113.

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extent of one-third of the value of the property. It, therefore, decreed the plaintiff's suit to that extent. Both parties appealed. The lower appellate court has allowed the appeal of the defendants and has dismissed the suit altogether. The plaintiff comes here in second appeal.

Three points are taken. First, that the gift to the daughter on the occasion of her marriage is justified provided that it is reasonable in amount and does not exceed, at the most, one-quarter of the property; but that there is no justification for a gift to the bridegroom. Secondly, that under the terms of the deed itself it must be held that a portion, at any rate, was reserved for the use of Musammat Mohna herself and that the entire estate was not, therefore, really given away; and, thirdly, that if the mother brought about an unsuitable match of her blind and crippled daughter, that would be practically equivalent to selling the daughter in marriage, and, as such, would be opposed to public policy. On this last point I see no indication that this line was taken in either of the courts below and certainly there are no findings arrived at on which it can be supported. It is found that Musammat Orcha was blind and a cripple. It is also found that her husband had already been married to another wife, but the crucial finding of the court below, it seems to me, is, that it being the duty of the mother to provide a husband for her daughter, the alienation was made for "a sheer legal necessity." Stress was laid on the case of *Churaman Sahu* v. *Gopi Sahu* (1). That was a case of a gift by a widow of a portion of the immovable property of her husband to her daughter on the occasion of her *gauna* ceremony. This and some other cases that have been quoted all refer to gifts made to the daughter. In the case of *Ramasami Ayyar* v. *Vengidusami Ayyar* (2), it was held that a gift made to a son-in-law, under similar circumstances, of a portion of the property, was binding on the reversioners. In the case of *Churaman Sahu* v. *Gopi Sahu* (1), reference is made to an old case decided by their Lordships of the Privy Council (*vide* page 7). There it is stated that Lord GIFFORD laid down "that a Hindu widow had, for certain purposes, a clear authority to dispose of her husband's property, and might do it for religious purposes, including dowry to a daughter," but that it was impossible to define the extent and limit of her power of disposing it, but

(1) (1900) I. L. R., 27 Calc., 1.
(2) (1898) I. L. R., 22 Mad., 113.

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"it must depend upon the circumstances of the disposition whenever such disposition shall be made and must be consistent with the law regulating such disposition." Now, although the general rule seems to be that a gift to the daughter shall not exceed one-quarter, some commentators have held (see bottom of page 5 and top of page 6 of the Calcutta decision), "that the word 'quarter' is here used, not in its plain sense, but simply to enjoin the allowance of as much as will suffice for the marriage of the sisters."

It seems to me that no hard and fast rule can be laid down. If the property is of large value, probably the alienation of more than a quarter would not be upheld. But where the property is very small in value,—here it is valued at Rs. 500 only—and where under the circumstances the marriage of the girl into a suitable Brahman family, having regard to her blindness and infirmity, necessitated the spending of the equivalent in value of that property, then, in the words of the lower court, the alienation was "a sheer legal necessity."

The second point is based on some words in the deed of gift, generally to the effect that the donee will look after and support the widow in her life-time and perform her funeral ceremonies on her death. The property is given out-and-out to the son-in-law without any sort of reservation and there is no charge on it for her support. The learned Judge of the lower appellate court, who is certainly better able to appreciate the meaning of this document than I am, has come to the conclusion that the words in the deed which the learned Munsif read as a provision for maintenance in favour of Musammat Molina were incapable of being interpreted in that way. It is perhaps significant to note that although the widow died as long ago as 1908, the suit to set aside the gift was not brought till ten years afterwards. In my opinion the finding of fact arrived at, namely, that in order to get the girl married, it was "a sheer necessity" for Musammat Molina to provide a dowry of Rs. 500 or its equivalent by the gift of the property, concludes this appeal. I, therefore, dismiss it with costs.

Munshi *Harnandan Prasad*, for the appellant.

The appeal was heard under order XLI, rule 11, Civil Procedure Code.

MEARS, C. J., and STUART, J.:—We are of opinion that the learned Judge decided this case rightly. We, therefore, dismiss the appeal

Appeal dismissed.

APPELLATE CRIMINAL.

1923
January, 3

Before Mr. Justice Walsh

EMPEROR v. KHETAL AND OTHERS.*

Act No I of 1872 (Indian Evidence Act), section 21—"Confession"—"Inducement or promise"—Identification—Evidence led of identifications made by an accused person.

A confession made by an accused person with the explanation added that he had been told by the *darogha* that he would be made an approver is not admissible in evidence against the person making it. Neither can secondary evidence be given of identifications made by an accused person who has not been made an approver.

The fact that a witness makes mistakes in identification is not a reason for discrediting his evidence in other matters.

THIS was an appeal from an order of the Sessions Judge of Shahjahanpur convicting Khetal and others of dacoity and sentencing them each to ten years' rigorous imprisonment. The facts of the case sufficiently appear from the judgment of the Court.

Mr. *J. M. Banerji*, for the appellants.

The Government Pleader (Mr. *Shankar Saran*), for the Crown.

WALSH, J.:—In this case five men, Daryao Singh, Umrai, Sibba Singh, Khetal and Bhopal Singh, appeal against their convictions for dacoity by the Sessions Judge of Shahjahanpur. They have all been sentenced to ten years' rigorous imprisonment. It is a bad case. Owing to the mistakes of the Sessions Judge, and to what appear to me to be errors of judgment on the part of the Deputy Superintendent of Police, due, in part, to a strange order by the Magistrate in refusing an application for pardon, I have had difficulty in disposing of the case. I am compelled to allow two of the appeals, but, in one case, it seems to me a miscarriage of justice.

The learned Judge has based his decision almost entirely upon the confessions of Daryao Singh and Sibba Singh. He has worked from this standpoint, and has sought for corroboration of the confessions from independent evidence against each of the accused, except in the case of Daryao Singh where he has fallen back upon the confession of his co-accused, Sibba Singh. This is a very usual method in such cases as this, but when both confessions are inadmissible, which is the case here, it has serious drawbacks. A great deal of the Judge's work has been thrown away, and I have had to do it again.

* Criminal Appeal No. 886 of 1922, from an order of L. B. Mundle, Sessions Judge of Shahjahanpur, dated the 17th of October, 1922.

The dacoity took place in the night of the 4th and 5th of June, 1922, and, on the 6th of June, Daryao Singh and Sibba Singh were arrested. Both were old soldiers and had gun licences. Both were obviously persons who never ought to have been permitted to carry firearms. Both were willing to sell their comrades to the public for a pardon. I am quite satisfied that both were induced to make their confessions by the promise of being made an approver, if possible.

At the end of his confession, Daryao Singh said that he had been told by the *darogha* that he would be made an approver. He explained to the Magistrate, in the most convincing fashion, that he was telling the truth for this reason, and that he knew that what he said might procure his conviction or his release. The Magistrate wrote the usual certificate in an unusual form. He said :—" I believe the above statement was voluntarily made, although it is quite possible that the police officers may have told him that he will be made an approver." It seems incredible that this confession should have been admitted in the face of this. Section 24 of the Evidence Act makes a confession inadmissible if it appears to have been caused by *any inducement or promise*. Both the Sessions Judge and the First Class Magistrate, and even the assessors, under the misdirection of the Judge, held that it was made voluntarily. Of course it was, in the colloquial sense of that term. Everything done willingly under a promise or inducement is done voluntarily. Every Judge ought to know that this section requires a confession to be made spontaneously and without any inducement, and " voluntarily," only in that sense. This is elementary. In the case of this appellant there is no independent evidence against him and he must be acquitted.

I am satisfied that the confession of Sibba Singh was also caused by the same inducement. He not only says so himself, but the Deputy Superintendent of Police said at the trial that the confession of Daryao Singh was not clear or satisfactory to his mind. He, therefore, took Sibba Singh with him to the spot to verify his statements, obviously with the intention of making him an approver instead of Daryao. He applied to the Magistrate for a pardon to Sibba Singh. This, for some reason which has not been stated in evidence, was refused. This seems to have upset the judgment of the Deputy Superintendent and he abandoned the plan of putting forward any accused as an approver, apparently trusting to evidence of

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identification against these two men, and possibly also to their confessions. But neither of them has been identified. In addition to this, it is to be noted that these two accused, while awaiting trial, were put up to identify their co-accused. If either of them was to be made an approver, this would be a natural proceeding. But neither of them was, and the Sessions Judge allowed evidence of identification by them, which, in substance, came to little, to be given at the trial. The Judge has failed to see that inasmuch as an accused cannot give evidence while on his trial, secondary evidence of identification by him is clearly inadmissible. Evidence by an official witness of an identification is only admissible if the identifying witness is called to support his identification on oath. Both these confessions ought to be rejected. But in the case against Sibba Singh there are other features which I will examine hereafter.

The case against Umrai rests upon the inadmissible confession of Sibba Singh, and a remarkable incident alleged to have occurred when he was arrested. Sibba Singh had been left at the village of the dacoity in the custody of two constables. He had first disclosed, and handed over, a few articles looted at the dacoity, which were hidden on his premises. He was driven back on an *ekka*, accompanied by the two constables. In the Sadar Bazaar, Shahjahanpur, he pointed out Umrai to the constables, who arrested him as one of the dacoits. The Judge says this was on the 12th of July. But he has made several slips in his dates, and it must have been the 12th of June. Umrai was not searched. This was a piece of gross negligence. He was driven on the *ekka* to the Deputy Superintendent's house, where he was searched, and nothing incriminating was found. When the party came away from the Deputy Superintendent's house, it was decided to leave the *ekka*. Two coats belonging to the two constables had been spread on the *ekka*, and the four men had sat on them, the two prisoners, not handcuffed, sitting between the constables. When the coats were removed from the *ekka*, three ornaments, two being *basubands*, and, therefore, of some size, were found concealed beneath. The evidence of the finding is hopelessly contradictory. The *ekkawala* says the constable took down the coat; the constable says the *ekkawala* did. One says they were picked up from the ground; another says they were found under the coat. One constable and the *ekkawala* contradict one another as to which coat Umrai sat upon. The Judge has

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noted only one discrepancy, but the witnesses seem agreed upon hardly a single detail. Umrai's costume was such that concealment of these articles must have been difficult. It must also have been difficult to put them under the coats upon which the four men were sitting. It is necessary to find that he had them on him when he went, one week after the dacoity, and sat in a shop in the bazaar. There is nothing suggestive about the shop, and I am unable to accept this story of the finding of the articles in his possession as satisfactorily proved. There is no other evidence against Umrai, and he also is entitled to an acquittal.

As for Sibba Singh, there is a good deal of evidence against him which the Sessions Judge, presumably because he relied upon the confession, has not dealt with in detail. The discovery of the ornaments at his house is clearly a fact discovered within the meaning of section 27 of the Evidence Act, and is admissible in evidence. As the guilt of Umrai is not established, the discovery of Umrai is not a fact within the meaning of this section. The discovery of the gun by the police with the assistance of Sibba would have been such a fact, if it were clearly established that this gun had been used in the dacoity. But the Judge has rightly formed the opinion that it was not, and that the gun exhibited in the case, which was dropped by a dacoit during the struggle with the villagers, was the gun covered by Sibba's licence. He has given strong reasons for this inference, but the fact is corroborated by the evidence of two witnesses. Ganga Ram at the trial pointed to Sibba as the man who dropped the gun. Narpat said the same thing. He also said that he had told the investigating officer this, before the hearing by the committing Magistrate, but that he forgot it when giving evidence. This happens not infrequently in criminal cases, and is often due to the omissions of the prosecuting officer in examining the witnesses. It appears to be an honest and natural statement. Narpat made a hopeless mess of the identification at the jail. Sibba, of course, was not put up, but Narpat said he did not see Sibba when he came to the village. The fact that a witness makes mistakes in identification is no reason for discrediting his evidence in other matters. It is, indeed, strong evidence that he has not been coached by the police, but is merely an enthusiast who is not to be trusted in recognizing faces seen under such circumstances. But it is another thing when a man is seen in moonlight struggling with a gun which he is

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forced to drop. It must be accepted that Sibba was using the gun which had been dropped at the dacoity, that he had two guns in his possession, and that he voluntarily disclosed the second in order to disclaim his connection with the one dropped. This is quite sufficient to establish his guilt.

With reference to Khetal and Bhopal, they were identified by eight, and four, witnesses respectively. Making due allowance for those who made mistakes, and ignoring the confessions of Daryao and Sibba, which I have not read, the balance of evidence against these men is ample, and their convictions were right.

The result is that the appeals of Daryao and Umrai are allowed and they must be discharged. The appeals of Sibba, Khetal and Bhopal are dismissed and their convictions and sentences confirmed.

I direct that a copy of this judgment be sent to the District Magistrate with a view to his considering the propriety of instituting proceedings against Daryao Singh under the bad livelihood sections. I have held that the confessions were inadmissible in law. But Daryao's statement may afford clues to evidence as to his conduct. It appears also that he is an associate of Sibba Singh, and identified the brother, Sukha, in jail. It would be well if the District Magistrate were to draw the attention of the Magistrate who took the statements of Daryao and Sibba Singh to what I have said about section 24, and to inquire why two accused persons, who were not made approvers, were put up to identify their co-accused, and why the Deputy Superintendent's application for a pardon for Sibba Singh was refused. He should also draw the Deputy Superintendent's attention to the negligence of the constables in failing to search Umrai when he was arrested.

APPELLATE CIVIL.

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January, 4.

Before Mr. Justice Bryes and Mr. Justice Gokul Prasad.

MAHADEO PRASAD (Objector) *v.* MUSAMMAT HAMIDAN AND OTHERS (Decree-holders).*

Civil Procedure Code, order XXI, rule 2, clause (3) —Compromise decree— Payment to person other than decree holder Payment to be out of

Where a payment has to be made by a party to a compromise decree, the fact that such payment is to be made to a third party and not to the

*Second Appeal No. 110 of 1922, from a decree of Nadir Husain, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge of Cawnpore, dated the 23rd of September, 1921, confirming a decree of Vishwambhar Prakash, Munsif of Akbarpur, dated the 19th of February, 1921.

decree-holder does not relieve the party who is responsible therefor from the necessity of certifying such payment, when made, to the court concerned

THE facts of this case sufficiently appear from the judgment of the Court.

Maulvi *Muhammad Abdul Aziz*, for the appellant.

The respondents were not represented.

REVES and GOKUL PRASAD, JJ. :—This is an execution second appeal arising under the following circumstances :—It appears that Abdul Aziz Khan, the original respondent, made a mortgage of some property in favour of Lachmi Naram and another in the year 1908. In the year 1913 he made a usufructuary mortgage of the same property in favour of Mahadeo Prasad, the appellant, and some money was left with Mahadeo Prasad to pay off the first mortgage in favour of Lachmi Naram and another He failed to do so, and upon that Abdul Aziz sued to redeem the mortgage of the year 1913 in favour of Mahadeo Prasad. This suit resulted in a compromise under which Mahadeo Prasad was directed to pay off the first mortgage by certain instalments and it was further provided that in case Mahadeo Prasad failed to do so, the mortgagor, Abdul Aziz Khan, would be entitled to recover possession of the property mortgaged to him. This was on the 28th of April, 1917. Abdul Aziz has now applied to recover possession of the property mortgaged by him to Mahadeo Prasad, on the allegation that Mahadeo Prasad has failed to pay the amount due to Lachmi Naram and another, the prior mortgagees, by instalments as contemplated in the compromise decree. Mahadeo Prasad pleaded payment to the prior mortgagees as contemplated by the compromise decree. This payment to the prior mortgagees by Mahadeo Prasad was not certified in court as required by order XXI, rule 2, of the Code of Civil Procedure, and, accordingly, the courts below have dismissed the plea of payment raised by Mahadeo Prasad, under clause (3) of order XXI, rule 2, of the Code of Civil Procedure. Mahadeo Prasad comes here in second appeal and says that as the decree did not contemplate any payment to Abdul Aziz Khan, the mortgagor decree-holder, order XXI, rule 2, did not apply and such payment could be recognized and ought to have been recognized by the court executing the decree. It might be mentioned here that Lachmi Naram and another, the prior mortgagees, have supported Mahadeo Prasad by admitting receipt of the money in accordance with the compromise decree, to which they were

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parties The learned counsel for the appellant contends that the payment of money contemplated by order XXI, rule 2, is a payment to the decree-holder, and, as the payment directed by the compromise decree was not a payment to be made to the decree-holder but to a third person, order XXI, rule 2, does not apply and the courts below ought to have given effect to the payment pleaded by the appellant. The words of rule 2 are very general and there is nothing in them to limit the payment to the decree-holder only. The words used are, "Where any money payable under a decree of any kind is paid out of court or the decree is otherwise adjusted, etc. etc." We have no difficulty in coming to the conclusion that the payment directed to be made to a third person under a decree like the present one comes within the scope of this rule and the decision of the courts below was correct. Mahadeo Prasad ought to have proceeded, under clause (2) of rule 2, to safeguard his interest. Such payments having not been certified. the courts below were right in refusing to accept them. In our opinion the decree of the court below was a right decree. We dismiss this appeal, but without costs, as the respondents are not represented.

Appeal dismissed.

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January, 4

Before Mr. Justice Lyons and Mr. Justice Gokul Prasad.

RAM SARAN AND ANOTHER (DEFENDANTS) v. BINODI BIHARI GHOSH (PLAINTIFF)*

Act No. IX of 1908 (Indian Limitation Act), schedule 1, article 47—Criminal Procedure Code, section 145—Forcible eviction of person in possession under a magisterial order followed by suit for declaration of title—Limitation.

A P, the head of a joint Hindu family, took a lease of certain immovable property. *B* claimed a share in the property leased and resisted the taking of possession by the lessee. Proceedings were taken under section 145 of the Code of Criminal Procedure, which ended in an order, dated the 9th of March, 1914, maintaining the possession of *B* and others. In 1919 the son and grandson of *A P* deceased forcibly evicted *B*, who took criminal proceedings against them and was restored to possession under an order dated the 8th of September, 1919. On the 9th of March, 1920, the lessees filed a suit against *B* for a declaration of their title in respect of the room and for an injunction.

Held that article 47 of the first schedule to the Indian Limitation Act, 1908, applied and the suit was barred by limitation.

THE facts of this case are fully set forth in the judgment of the Court.

Munshi *Damodar Das*, Maulvi *Iqbal Ahmad* and Munshi *Kumuda Prasad*, for the appellants.

* Second Appeal No. 371 of 1921, from a decree of B. J. Dalal, District Judge of Allahabad, dated the 2nd of March, 1921, confirming a decree of Tirkki Nath, Munsif of Allahabad, dated the 6th of December, 1920.

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RAM SAHAI v. BINODE BIHARI GHOSH.

Babu *Indu Bhushan Banerji* and Munshi *Maheshwari Prasad*, for the respondent.

RIYES and GOKUL PRASAD, JJ.:—The facts out of which this appeal arises are as follows:—Ajudhia Prasad, the father of Ram Sahai and grandfather of Barjnath Prasad, plaintiffs in this suit, took a permanent lease of a compound in the city of Allahabad, on the 7th of September, 1913, from Sita Ram Ghosh and his two brothers Binode Bihari Ghosh, the defendant respondent here, claimed a share in the compound, and it appears that proceedings were taken against him, at the instance of Ajudhia Prasad, under section 145 of the Code of Criminal Procedure. Those proceedings ended in an order by the Magistrate maintaining the possession of Binode Bihari Ghosh in one room in the compound and maintaining the possession of Ajudhia Prasad in the rest of the compound. This order was passed on the 9th of March, 1914. Subsequently Ajudhia Prasad died without having instituted any suit in the civil court to contest the Magistrate's order. Afterwards, in 1919, the plaintiffs appellants forcibly ejected Binode Bihari Ghosh from the room he was occupying. Binode Bihari Ghosh took criminal proceedings against the plaintiffs under section 448 of the Indian Penal Code, with the result that the plaintiffs were convicted and fined, and, under section 522 of the Criminal Procedure Code, Binode Bihari Ghosh was put back into possession of the room. This order was dated the 8th of September, 1919. Thereafter, on the 9th of March, 1920, the plaintiffs brought this suit for a declaration that they were the owners in possession of the room in dispute and that the defendant had no right therein, and, secondly, for a perpetual injunction to be issued to the defendant to restrain him from interfering with the plaintiffs' possession. Both courts have dismissed the suit on the ground that under article 47 of the first schedule to the Indian Limitation Act the suit was barred by time.

The plaintiffs come here in appeal, and, as the questions involved are somewhat difficult, the case has been referred to a Bench of two Judges for disposal. Three main grounds are taken against the decision of the courts below. First, it is argued that article 47 does not apply because this suit is not a suit, on the face of it, to recover the property but is a suit for a declaration pure and simple. Next, it is argued that article 47 cannot apply at all to the facts of this case, because the order under section 145 of the Code of Criminal Procedure did

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not refer to the room now in dispute. There was a third plea raised, namely, that, in any case, the order under section 145 was made against Ajudhia Prasad alone and that the plaintiffs were, therefore, not bound by that order, because they were not claiming through him but in their own right as surviving members of a joint Hindu family of which Ajudhia Prasad was a member.

On the second point, it seems to us that the court below has found, rightly or wrongly, that the order under section 145 referred to the room now in suit. It seems to us that that is a finding of fact. The lower court has considered the evidence and come to a finding thereon and it is not open to us to interfere with that finding.

On the third point, it seems to us that the plaintiffs are in a dilemma. There is no doubt that Ajudhia Prasad took the lease. He either took it in his personal capacity or he took it as the head and managing member of a joint Hindu family. If he took it in his personal capacity, there can be no doubt that the plaintiffs must claim through him as his next heirs and, therefore, article 47, if it applies at all, would apply to them. If, on the other hand, Ajudhia Prasad took the lease as the managing member of the family, for the family it seems to us that he must have taken proceedings under section 145 as the managing member of the family on behalf of the family, and, if so, he and the whole family were bound by the order under section 145.

There remains the first ground, which is not free from difficulty. Article 47 lays down that a suit by any person, bound by an order respecting the possession of immovable property made under the Code of Criminal Procedure of 1898, to recover the property comprised in such order, must be brought within three years of the date of the final order in the criminal court. The final order in the criminal court was passed, as we have said, on the 9th of March, 1914. Any suit, therefore, to recover possession of property comprised in such order could only have been brought up to the 9th of March, 1917. No such suit was brought. It seems to us, therefore, that the learned Judge of the court below is right in holding that the suit was barred. It does not seem to us that the plaintiffs, by taking the law into their own hands and forcibly ejecting the defendant, so as to enable them to bring a suit in the form of a suit for a declaration merely, can enlarge the period of limitation prescribed by law, within which only they were

entitled to recover possession We, therefore, are of opinion that the decisions of the courts below were right. We accordingly dismiss this appeal with costs.

Appeal dismissed.

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RAM SARUP v. BINODE BIHARI GHOSH

Before Mr Justice Ryves and Mr. Justice Daniels.

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RAM CHARITRA (PLAINTIFF) v. MOHAN DAS AND ANOTHER (DEFENDANTS).[1]

Act (Local) No. III of 1901 (United Provinces Land Revenue Act), section 233 (k)—Partition—Objecting co-sharer referred to civil court—Suit dismissed, but subsequently decreed in appeal—No information given to revenue court—Subsequent suit for recovery of share not maintainable.

Plaintiff, being a co-sharer in a mahal, partition of which had been applied for by another co-sharer, filed an objection in the partition proceedings, and, as his objection raised a question of title, he was referred to the civil court under section 111(1)(*b*) of the United Provinces Land Revenue Act. He accordingly filed a suit, which was dismissed. He appealed, and on the 9th of April, 1912, the appellate court made a decree in his favour. Plaintiff, however, did not inform the revenue court either that he had appealed or of the result of the appeal, and the partition proceedings were completed. In January, 1918, plaintiff filed a suit, based on the civil court's decree, for recovery of the share to which he had been declared entitled thereby.

Held that the suit was barred by section 233(*k*) of the United Provinces Land Revenue Act, 1901.

THE facts of the case appear from the following referring order :—

STUART, J. :—The question raised is one of considerable importance and some difficulty. A certain property was transferred by a Hindu woman to persons, who claimed perfect partition thereof in a revenue court. The persons who alleged themselves to be the reversioners of the last male owner objected in the partition proceedings, under section 111 of the Land Revenue Act. They were recorded co-sharers of the village. Their objection raised a question of proprietary title. They were required to institute within three months a suit in the civil court. They instituted such a suit. It was dismissed. They filed an appeal. After the dismissal of the suit but before the decision of the appeal the revenue-authorities completed the partition, deciding the point against them. After the partition had been completed, the appeal in the civil court was heard and the point was decided in favour of the persons who alleged themselves to be reversioners. Now the woman is dead and they are endeavouring to recover the property partitioned. The lower appellate court has refused them the relief asked for, holding that the civil court has no jurisdiction in the matter, under the provisions of section 233(*k*) of the Land Revenue Act. It appears to me that the revenue authorities who conducted the partition were clearly wrong, and that they did not act in conformity with the provisions of section 111(2), for the case was not dealt with in accordance with the decision of the civil court as there had been no final decision of the civil court. But what was the remedy? As far as I can see, the actual remedy should have been by an appeal under section 133 of the Land Revenue Act. Another question for determination will be whether it can be possibly held that section 233(*k*) covers the case; but, even if it be decided that section 233(*k*) does not cover the case, a further question will remain as to whether a civil court has jurisdiction. These points are of con-

[1] Second Appeal No. 426 of 1921, from a decree of Jitendra Mohan Basu, Subordinate Judge of Basti, dated the 2nd of November, 1920, reversing a decree of Jamuna Narain Dikshit, Munsif of Basti, dated the 2nd of May, 1918.

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siderable importance and their decision will govern similar cases which may arise in the future. I, therefore, refer the decision of this appeal to a Bench of two Judges.

On the appeal being laid before a Bench—

Munshi *Girdhari Lal Agarwala*, for the appellant.

Munshi *Harnandan Prasad*, for the respondents.

RYVES and DAWKINS, JJ.:—This appeal raises an unusual point of law and has, therefore, been referred to a Division Bench for disposal.

Musammat Mohan Dei, one of the proprietors of a mahal, applied for a perfect partition, under the Land Revenue Act, some time in 1911. Ram Charitra, the plaintiff appellant here, filed an objection claiming that he was a proprietor of an eight pies share in the mahal of which partition was sought. The revenue authorities proceeded under section 111 (1) (*b*) of the Land Revenue Act and directed him to establish his claim in the civil court. Ram Charitra accordingly brought a suit, but that suit was dismissed on the 29th of November, 1911. He appealed and the appellate court reversed the trial court and gave him a decree declaring him entitled to the declaration which he sought. This was on the 9th of April, 1912. After the decision of the first court and before the decision of the appellate court, it appears that partition *pro rata* were completed. It must be the case that Ram Charitra took no steps to inform the revenue court either that he intended to appeal or had appealed against the decision of the trial court. Nor did he take any steps, even after the case was decided in his favour by the appellate court, in the revenue courts, either by way of appeal or by an application for review. On the 17th of January, 1918, that is, seven years afterwards, he brings this suit for the recovery of possession of the eight pies share which he claimed. His plaint entirely ignores the partition and his claim is based on the decision of the appellate court in 1912. The only defence to the suit with which we are now concerned is that it was barred by section 233 (*k*) of the Land Revenue Act. This was the view taken by the lower appellate court, and, in our opinion, it was right. Section 233 provides that no person shall institute any suit in the civil court with respect to any of the following matters:—

Paragraph (*k*): Partition or union of mahals except as provided in section 111 and section 112.

This suit is clearly not a suit such as is contemplated by section 111 of the Land Revenue Act. No doubt the former

suit was, but this suit clearly is not. It has been held in a series of rulings by this Court that section 233 (*b*) bars a suit in the civil court which attempts to disturb the title to land as established in a partition in the revenue court. The result is that the appeal fails and is dismissed with costs.

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RAM CHARITRA v. MOHAN DEI.

Appeal dismissed.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

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January, 11.

RAM RAGHUBAR LAL (DEFENDANT) v. DIP NARAIN SINGH AND OTHERS (PLAINTIFFS).[1]

Hindu law—Legal necessity—Money raised to defend a member of a joint family accused of murder—Mortgage of family property—Suit by member of family to set aside mortgage—Burden of proof.

RS, a member of a joint Hindu family, but not the *karta*, was charged with murder, and, in order to procure money for his defence, his two sons and his brother joined him in making a mortgage of part of the joint family property. *RS* was acquitted. Some two years later an uncle of *RS* filed a suit against the mortgagee and others for a declaration that the mortgage deed was fictitious and given without any legal necessity. The plaintiff stated in his plaint, *inter alia*, that the expenses of the criminal case had been defrayed entirely from the income of the joint family property.

Held that it lay on the plaintiff to make out a *prima facie* case that the condition of the family at the time when the criminal charge was brought was such that there was no need for borrowing money. Ordinarily speaking, the defence of a member of the family charged with a serious crime would be a matter which might well justify the borrowing of money and a charge on the property of the joint family. The case was to be distinguished from one in which the lender was trying to recover money advanced on the security of family property by sale of the same. *Beni Ram* v. *Man Singh* (1) and *Ramalingam Pillai* v. *Muthayyan* (2), referred to.

THE facts of this case are fully set forth in the judgment of MUHAMMAD RAFIQ, J.

Mr. *B. E. O'Conor*, Munshi *Girdhari Lal Agarwala* and Munshi *Damodar Das*, for the appellant.

Babu *Piari Lal Banerji*, for the respondents.

MUHAMMAD RAFIQ, J.:—Babu Ram Sewak Singh, defendant respondent No. 2, was implicated in the murder of one Mr Lawrence Barber, in the district of Azamgarh, in the year 1915. While Babu Ram Sewak Singh was in jail he, with his two sons and his brother, executed a deed of mortgage for Rs. 10,000 in favour of Lala Ram Raghubar Lal, the defendant appellant before us. Subsequently Babu Ram Sewak Singh was tried and acquitted. On the 1st of April, 1920, the uncle of Babu Ram Sewak Singh, namely, Dip Narain Singh, brought the suit out of which this appeal has arisen for a declaration that the mortgage deed of the 16th February, 1915,

[1] First Appeal No. 265 of 1920, from a decree of Pyare Lal, Subordinate Judge of Azamgarh, dated the 13th of May, 1920.

(1) (1911) I. L. R., 34 All., 4.

(2) (1914) 26 M. L. J., 528.

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executed by Ram Sewak Singh in favour of Raghubar Lal, was fictitious and given without legal necessity. The material allegations were made in [illegible] 4 and 5 of the plaint. They were as follows:—

In 1915 Babu Ram Sewak Singh, defendant No. 2, was charged with the murder of Mr. Lawrence Barker. The criminal court had ordered an attachment of the property in dispute for the appearance of defendant No. 2, and it was apprehended that the property would be confiscated; hence defendant No. 2, who on account of previous connection and friendship had great confidence in defendant No. 1, executed, on the 16th of February, 1915, an entirely fictitious mortgage deed, without consideration, for Rs. 10,000 without any family necessity and without the knowledge of the plaintiff. In this document he fraudulently got the property in dispute specified below which belongs to the whole family.

The expenses of the said criminal case were defrayed entirely from the income of the family property while Babu Ram Sewak Singh, defendant No. 2, was in jail. Contracting loans under such circumstances cannot be regarded as valid necessity by law.

There were other allegations [illegible] the validity of the deed of mortgage, such as the high rate of interest and the absence of the consent of the plaintiff to the deed, which need not be considered at present. The claim was brought against Ram Raghubar Lal and the four executants of the mortgage deed. Ram Raghubar Lal was the principal defendant. Ram Sewak Singh and his brother, Sri Newas, filed a written statement in which they made no definite statements with regard to the allegations in the plaint, but stated that they had no objection to the claim of the plaintiff and, therefore, they may be exempted from the array of the defendants and costs. Ram Raghubar Lal did not put in an appearance and no defence was filed by him. The court of first instance tried the case *ex parte* and decreed it, *i.e.*, the declaration sought by the plaintiff, in his relief No. 1, was granted. Ram Raghubar Lal, in his appeal to this court, contends that the evidence produced by the plaintiff was insufficient for the lower court to grant the relief that has been granted. It is argued on behalf of the appellant that the deed of mortgage of the 16th February, 1915, was challenged by the plaintiff mainly on two grounds, namely, that it was fictitious and without consideration, and, secondly, that it was given without any legal necessity. There is no evidence in support of either of these two allegations. On the other hand, the contention for the plaintiff respondent is that the onus was upon Raghubar Lal to prove that the deed of mortgage of the 16th February, 1915, was a good and valid deed, *i.e.*, that it was obtained for consideration and that there was a legal necessity at the time of its execution for creating a charge on the family property.

It was further argued that though Ram Sewak Singh was in trouble at the time, the mere fact of his being in jail on the charge of murder would not entitle him to burden the joint family property as he was not the *karta* of the family nor has it been shown that the income of the family property was insufficient to supply funds for his defence. In my opinion the contention for the appellant ought to prevail. Dip Narain, though *karta* of the family, came into court as a plaintiff to get a declaration that the hypothecation bond of the 16th February, 1915, wherein the property specified in the plaint has been hypothecated, is entirely fictitious and without consideration and was executed without any legal necessity, is null and void in law and inoperative, and may be cancelled. It was, therefore, for him to prove that the deed of the 16th February, 1915, was fictitious and without consideration. He had distinctly stated in his plaint the reason why he described the document as fictitious. In paragraph 4 of the plaint he said that a warrant of attachment for the property of Ram Sewak Singh was out from the court of the Magistrate, and, in order to save the property, the mortgage in question was given without any consideration. Ram Raghubar Lal was a friend of the family and the deed was written in his favour, knowing that he would not take advantage of the mere execution of the deed, and the procedure would save the property from attachment and sale. These circumstances required evidence in their support. It was for the plaintiff to establish these circumstances. The fact that the defendant, Ram Raghubar Lal, was absent and the case was tried *ex parte* would not do away with the necessity of proving those circumstances. I, therefore, think that the declaration sought by the plaintiff, Dip Narain, that the deed of the 16th February, 1915, should be declared null and void on the ground that it was fictitious and without any consideration cannot and should not be granted to him in view of the state of the evidence on the record. The second ground upon which the deed in question is challenged is the absence of legal necessity. It is true that when a creditor wants to enforce a charge on the joint family property created upon it by one member of the joint undivided Hindu family, it is for the creditor to [illegible] *prima facie* case of legal necessity. If the charge is challenged by the other members of the family on the ground that it was created without any legal necessity. In the present case [illegible]

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not the creditor who is enforcing his charge against the family property. It is one of the members of the joint family who is seeking for a declaration that the charge created upon the family property should be null and void on the ground that it was created without legal necessity. I should think that in such a case there should be some *prima facie* evidence given by the plaintiff before the creditor is called upon to give evidence with regard to the validity of his document. The facts alleged in the plaint themselves go to show that there was legal necessity at the time that the deed in question was given. The plaintiff admits in his plaint that one of the executants, namely, Ram Sewak Singh, was in jail at the time on a very serious charge, *i.e.*, of murder. The plaintiff however, goes on to say that though Ram Sewak Singh was in jail on the charge of murder yet his defence was conducted from the joint funds. I think that if a member of a joint undivided Hindu family is standing his trial on a serious charge of murder and wants funds to defend himself and raises funds by executing a charge on the family property, he does so under necessity which may be called legal necessity under the Hindu law. In the present case the plaintiff has failed to show that the defence of Ram Sewak Singh was conducted from joint funds. The mere denial of legal necessity by Dip Narain when he comes into court as a plaintiff is, to my mind, not sufficient. I have, in reciting the case for the respondent, observed that the attitude of the plaintiff respondent with regard to this point is that if a member of a joint Hindu family is on his trial on a serious charge and raises money by hypothecating the joint family property, such hypothecation is not for legal necessity. No authority has been cited in support of this proposition. There are two cases in which the *karta* of the family raised money for his defence, *Beni Ram* v. *Man Singh* (1) and *Ramalingam Pillai* v. *Muthayyan* (2). The learned counsel for the plaintiff respondent distinguishes those cases from the present one by stating that in the reported cases the *karta* of the family was implicated and he borrowed the money on the security of the family property. I do not think that there is any difference in principle where a *karta* of the family or a younger member of the family borrows money by hypothecating the family property in case he is in trouble in order to defend himself. I would, therefore, hold that the plaintiff, Dip Narain, has failed to make out a case for the declaration

(1) (1911) I. L. R., 34 All., 4
(2) (1914) 26 M. L. J., 528.

that he seeks in his plaint. I would further remark that on the terms of the mortgage in question the plaintiff respondent is not affected at all. The executants of the mortgage hypothecated their half share only in the joint family property. It is, however, said on behalf of Dip Narain that as the family was joint at the time of the execution of the mortgage, he (plaintiff) has an interest in each *bigha* of the property. That is quite true; but the terms of the mortgage do not affect his interest in the family property. In any case the granting of a declaration is a matter of discretion with the court, and, in my opinion, this is not a case in which such a discretion should be exercised. I should, therefore, allow the appeal, set aside the decree of the court below, and dismiss the claim of the plaintiff. I would make each party bear his own costs.

PIGGOTT, J.:—I agree that the plaintiff, Dip Narain, ought not, in this suit, and on this record as it stands, to be granted any declaration whatsoever. I admit that the case is a very peculiar one and that I have felt considerable difficulty as to the proper order for us to pass. We do not know why the appellant Lala Ram Raghubar Lal failed to enter an appearance in the trial court. There is a finding in the judgment under appeal that notice of the suit had been duly served "upon his *mukhtar'am* in the district of Fyzabad." If Ram Raghubar Lal had made any attempt to obtain a re-hearing of the suit in the trial court, or had even in his memorandum of appeal to this Court formally challenged the finding that notice of the suit had been duly served on any person authorized to accept service on his behalf, I think other considerations would have arisen. On the other hand, if the plaintiff Dip Narain had, even by way of a subsidiary defence to the appeal, submitted a formal application supported by an affidavit, to the effect that he would have produced further evidence in the trial court if the court itself had not intimated that the evidence actually tendered was sufficient to warrant the passing of an *ex parte* decree, I should have felt much disposed to send the case back to the trial court to be fully tried out on the merits. Practically, however, so far as this Court is concerned, both parties to the appeal have elected to stand upon the evidence recorded in the court below. On that evidence I feel no doubt that the plaintiff was not entitled to a decree declaring the deed in suit to be entirely fictitious and without consideration. There lay upon him, when he came into court as plaintiff [illegible]

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burden of proof which, in my opinion, was by no means discharged by the single statement of one of the executants of the bond, to the effect that he personally had received no money in connection with the same. There remains the question whether a declaration regarding the legal necessity for the bond ought to be granted in this suit. As has been remarked by my learned brother, the question of the granting of a decree in a declaratory suit is always in the last resource a matter of discretion with the court. No doubt that discretion has to be exercised upon proper and legal principles. But the present case is an altogether peculiar one. I am inclined to doubt whether a plaintiff, coming into court like Lala Dip Narain Singh has done in the present suit, should have been allowed to raise the question of legal necessity before the mortgagee had made any attempt to enforce his claim against the mortgage security and while it was still open to the mortgagee to seek relief by way of a claim for a simple money decree, if it had not been for the allegations in the plaint regarding the wholly fictitious character of the document. At any rate I am clearly of opinion that, in the present state of the record, we ought to refuse to make any declaration on the subject of the legal necessity for this document. As for granting the plaintiff a declaration that the deed in suit was executed without his knowledge and information, or that it does not affect the interest in the joint family property, if any, which the said plaintiff would take on partition, I do not think it would be proper to grant any declaration to this effect. Except in so far as they would be mere statements of law, they could not be based upon satisfactory evidence on the record. For these reasons I agree in the order proposed.

BY THE COURT.—The order of the Court is that the appeal is allowed and the decree of the lower appellate court is set aside and the claim of the plaintiff is dismissed. The parties shall bear their own costs.

Appeal allowed.

REVISIONAL CIVIL.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

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January, 11.

SHEO RAM KOERI AND OTHERS (PLAINTIFFS) *v.* IKRAM UN-NISSA BIBI AND OTHERS (DEFENDANTS) *

Act No IX of 1908 (Indian Limitation Act), section 18—Execution of decree—Irregularities in sale kept from knowledge of the judgment debtor by

* Civil Revision No. 83 of 1922.

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SHEO RAM KORRI v. JKRAM-UN-NISSA BIBI.

fraud of the decree-holder—Sale confirmed—Application by judgment-debtor to set aside sale—Limitation.

Under section 18 of the Indian Limitation Act, where irregularities affecting the validity of a sale in execution have, by the fraud of the judgment-creditor or other parties to the sale, been kept concealed from the judgment-debtor, he is entitled, whether the sale has been confirmed or not, to make, as against the person guilty of the fraud or accessory thereto, such application, if any, as he may be entitled to make, his time for making it being computed from the time when the fraud first became known to him. The confirmation of the sale ought not to be used as a shield for the fraud by which the court was induced to make the sale itself. *Mohendro Narain Chaturaj* v. *Gopal Mondul* (1), followed, and *Govind Chander Majumdar* v. *Uma Charan Sen* (2), dissented from.

THIS was an application for revision of an order passed in execution proceedings by the Subordinate Judge of Jaunpur. The facts of the case are fully set forth in the judgment of the Court.

Dr. *Kailas Nath Katju*, for the applicants.

Maulvi *Iqbal Ahmad* and Hafiz *Mushtaq Ahmad*, for the opposite parties.

MEARS, C. J., and BANERJI, J. :—This is an application in revision which raises a question whether section 18 of the Limitation Act applies when a sale in execution proceedings has already been confirmed. On the 20th of August, 1912, Sheo Ram obtained a final decree in a suit upon a mortgage for Rs. 685. On the 21st of January, 1913, he took steps in execution. The property in question was advertised for sale and on the 21st of April, 1913, was sold. The decree-holder had obtained permission to bid and, in fact, he bought the property on that day. On the 23rd of May, 1913, the sale was confirmed. On the 23rd of June, 1913, the guardian of the judgment-debtor, who throughout all the proceedings was a lunatic, asked that the sale might be set aside and he alleged a series of acts and calculated omissions by the decree-holder, and other conduct of the decree-holder and third parties, which pointed to fraud on the part of the decree-holder. It is said that before the execution court had time to consider that application on its merits, a suit was filed to set aside the decree on the ground of fraud. That suit was in fact filed some eighteen months after the filing of the application, namely, in December, 1914. In June, 1915, that suit was dismissed by the first court, in May of 1916 by the lower appellate court, and in July of 1918, by this High Court. Thereupon the application filed on the 23rd of June, 1913, was taken up by the Munsif on the 11th of January, 1919, and he passed an order setting

(1) (1890) I. L. R., 17 Calc., 769.
(2) (1887) I. L. R., 14 Calc., 679.

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SHEO RAM KOERI v. IKRAM-UN-NISSA BIBI.

aside the sale. From that order there was an appeal. The matter was remanded on two occasions for certain findings, but ultimately on the 3rd of April, 1922, Mr. Ali Ausat confirmed the order of the Munsif and set aside the sale of the 21st of April 1913. The learned Subordinate Judge set out various charges of fraud which he held had been established against the decree-holder. We are sitting here in revision, and even if we disagreed with him, we should nevertheless be bound to accept his findings. The point taken by the decree-holder is this, that the sale having been confirmed on the 23rd of May, 1913, from that day the execution court had no power to make any order varying that confirmation, or setting it aside, or in any way dealing with it, it being plainly stated by Dr. *Katju* that the right view to take of that order of the 23rd of May, 1913, is that when it was passed, the execution court became wholly *functus officio*. On the other side, it is said that whilst in a case in which no fraud was, before the 21st of May, 1913, would have been the last date upon which the judgment-debtor could have raised objection, nevertheless in a case of fraud an application can be made even after the thirty days, provided the judgment-debtor can show circumstances which bring him within the words of section 18 of the Limitation Act of 1908. Omitting the words which are not relevant to this matter, section 18 is as follows:—

> Where any person having a right to make an application has, by means of fraud, been kept from the knowledge of such right, the time limited for making an application against the person guilty of the fraud shall be computed from the time when the fraud first became known to the person injuriously affected thereby.

The question as to whether in fact the judgment-debtor had been kept from the knowledge of his right to make an application by means of fraud was one of the matters into which the Subordinate Judge inquired, and he was satisfied that the circumstances which would have entitled the guardian of the judgment-debtor to make an application, did not come to the knowledge of the guardian until the 3rd of June, 1913, and that, therefore, an application by him could have been made at any time between the 3rd of June and for thirty days thereafter. He did, in fact, make an application on the 23rd of June. The question which we have to decide is whether that application made as it was on the 23rd of June was not, in every way, as legally efficacious as if it had been made within thirty days of the date of the sale. We are of opinion that this is an enabling section which does extend the time, and

that when the person aggrieved shows facts which establish a fraud, and shows that by means of that fraud he has been kept from the knowledge of his right to make an application, he can, on the establishment of those matters, if he makes his application within thirty days, be in all respects in the same position as if he were making it within the thirty days of the sale, and the fact that the sale has been confirmed by the court in ignorance of the fraud is no bar to his application and does not stand as a bar to any further order which the court may make. This matter was considered in the case of *Mahendro Narain Chaturaj* v. *Gopal Mondul* (1) in the year 1890. There the very same point was taken that the sale having been confirmed section 18 was inapplicable. Mr. Justice PIGOT, at page 776, dissented from the expression of opinion in the case of *Gobind Chander Majumdar* v. *Uma Charan Sen* (2) and said as follows:—"I think that under section 18 of the Limitation Act, where irregularities affecting the validity of the sale have, by the fraud of the judgment-creditor or other parties to the sale, been kept concealed from the judgment-debtor, he is entitled, whether the sale has been confirmed or not, to make as against the person guilty of the fraud or accessory thereto, such application if any, under section 311 as he may be entitled to make, his time for making it being computed from the time when the fraud first became known to him. The confirmation of the sale ought not to be used as a shield for the fraud by which the court has been induced to make the sale itself." As we are in complete agreement with that expression of opinion by the learned Judge, it follows that this application in revision must fail. We accordingly reject it with costs.

Application rejected.

APPELLATE CIVIL.

Before Mr. Justice Ryves and Mr. Justice Daniels.

1923

January, 11.

SHEO RAMJI AND OTHERS (DEFENDANTS) v. SRI RIDHNATH MAHADEOJI AND ANOTHER (PLAINTIFFS).*

Idol—Representation of idol in litigation—Facts entitling a person to sue on behalf of an idol.

The original muhant being dead, and his *chela* and successor a minor, one of the supervisors of the endowment appointed one V as manager of the

* Second Appeal No. 709 of 1921, from a decree of A. G. P. Pullan, District Judge of Benares, dated the 12th of January, 1921, confirming a decree of Muhammad Owais Karney, Munsif of Benares, dated the 15th of September, 1920.

(1) (1890) I. L. R., 17 Calc., 769.
(2) (1887) I. L. R., 14 Calc., 679.

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property on behalf of the minor mahant. V in that capacity filed a suit in the name of the idol for the recovery of a portion of the endowed property which had been wrongfully sold by a relative of the last mahant.

Held that V was a competent person to file such a suit in the name of the idol to which the property claimed belonged in law. He had no personal interest in the property and no interest adverse to the minor. *Jodhi Rai* v. *Basdeo Prasad* (1), referred to.

THIS was a second appeal from a decree of the District Judge of Benares. The sole question raised was whether the plaintiff, who had filed a suit on behalf of an idol, was, in the circumstances set forth in the judgment of the Court, a person competent to do so.

Dr *Kailas Nath Katju*, for the appellant.

Munshi *Kumuda Prasad*, for the respondents.

REEVES and DANIELS, *JJ.* :—This appeal arises out of a suit brought in the name of an idol, through Vivekanand as next friend, to recover property belonging to the idol which had been wrongfully sold by a relative of the original Mahant, Ajudhia Puri. The suit has been decreed by both the courts below. The defendant appellant does not assert that his vendor had any right to dispose of the property, which admittedly belonged to the idol; but he attacks the decree on the technical ground that Vivekanand was not authorized to sue on behalf of the idol. Other pleas taken in the grounds of appeal were not urged. The endowment is a recent one and there is no rule of succession laid down in the deed establishing it. The original manager of the property was one Ajudhia Puri who is dead. Two persons, Ram Kishan Das and Baijnath Tewari, were appointed to supervise the management. Ajudhia Puri's *chela* and successor is a minor and Ram Kishan Das, in virtue of his powers of supervision, has, rightly or wrongly, appointed Vivekanand guardian of the property on the minor's behalf. Vivekanand is in possession of the title-deeds and has no interest adverse to the idol. It is important to note that this is not a suit brought by Vivekanand in the capacity of a trustee or *Shebait*. The real plaintiff is the idol, and, as was pointed out in the Full Bench case of *Jodhi Rai* v. *Basdeo Prasad* (1), a person suing on behalf of the idol is not personally interested in the suit any more than is the next friend or guardian of a minor. In our opinion Vivekanand has a sufficient interest in the subject-matter of the suit to be entitled to bring the suit in the name and on behalf of the idol. We accordingly dismiss the appeal.

Appeal dismissed.

(1) (1911) I. L. R., 33 All., 736

Before Mr Justice Muhammad Rafiq and Mr Justice Piggott. 1923

SURAJ NARAYAN PRASAD (DEFENDANT) *v.* RAM GHULAM SHUKUL AND *January*, 11.
OTHERS (PLAINTIFFS) AND SADHO SARAN SHUKUL AND OTHERS
(DEFENDANTS) *

Wajib-ul-arz—*Interpretation—Meaning of the term* "farokht"—*Pre-mortgage.*

Held as a matter of interpretation of a *wajib-ul-arz* in connection with a suit for "pre-mortgage" that the term "*farokht*" could not be given the same extended meaning as the term "*istiqdi*" when used in such documents.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Piari Lal Banerji* and Munshi *Harnandan Prasad*, for the appellant.

Pandit *Narmadeshwar Prasad Upadhiya*, for the respondents.

MUHAMMAD RAFIQ and PIGGOTT, JJ. :—This is an appeal by the defendant vendee in a suit described as one for pre-mortgage; *i.e.*, certain zamindari shares have been mortgaged to the appellant and the plaintiffs came into court claiming that as co-sharers in the villages in question they possess a preferential right, established by village custom, to obtain a contract of mortgage in their favour on the same terms on which the mortgage had been granted to the appellant. There was controversy, in the trial court, also as regards the amount of the mortgage debt, and this point is also raised in the memorandum of appeal before us. We are concerned, however, mainly with the question whether the plaintiffs have or have not established their preferential right on the basis of village custom. The main evidence consisted of records of rights for the three villages, namely, Kusmaha, Kanail and Doboli. As regards the settlement record of 1833, the entry would seem *primâ facie* to record a customary right of pre-mortgage, in favour of any co-sharer in the village, such as that upon which this claim is based; but in respect of this very same village we have before us also the settlement record of the year 1880. The custom there recorded is expressed in very peculiar terms. It is noted in the first instance that the co-sharers are in possession and occupation of their own shares and that there has been no sale, mortgage or lease, in favour of any person. Hereafter, it is stated, the said co-sharers possess unlimited power of transfer, subject only to the condition that any co-sharer

* First Appeal No. 265 of 1921, from a decree of Hanuman Prasad Varma, Subordinate Judge of Gorakhpur, dated the 31st of May, 1921.

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desiring to sell must first ascertain the wish of the other co-sharers. If the entry stopped there, it would be beyond question that it recorded no right of pre-mortgage. There is, however, one further phrase which is certainly not easy to interpret. Literally translated, it runs as follows :—" In case none of the co-sharers is prepared to purchase or to accept a mortgage or a lease, then the co-sharer in question may sell to a stranger." As it stands, this entry does not purport to record a right of pre-mortgage but merely imposes a further, and certainly somewhat peculiar and unusual, restriction on the right of sale. The trial court has come to the conclusion that the word " *farokht* " as used in this passage must be given a general sense and read as equivalent to " *intiqál* " or transfer. We are aware of no other case in which such an interpretation has been put upon the word " *farokht*." It is inconsistent with the ordinary meaning of the word and we are not prepared to say that anything in the particular text obliges us to put so unusual a meaning on the word. The conclusion we feel driven to is that the *wajib-ul-arz* in question does not record the existence of a customary right of pre-mortgage. The case *is* exactly the same regarding the village of Kusmaha, except that here we have before us only the settlement record of 1869 and not that of 1883. The share in the village Doboli is a very small one in proportion to the rest of the property mortgaged and we may take it from the judgment of the trial court that the existence of a customary right of pre-mortgage in that village was not very seriously contested. We think it at least doubtful whether the entry in the *wajib-ul-arz* of village Doboli made at the settlement of 1883 ought, in accordance with the canons of interpretation accepted by this Bench, to be treated as a record of custom or a record of contract. But, in any case, if we are not prepared to decree this claim in respect of the properties in villages Kusmaha and Kanail, we have no materials before us on which a decree could be framed regarding the small share in Doboli. This suit must in our opinion succeed or fail as a whole. There was very little other evidence in the case. The most important item, apart from the entries in the settlement papers already referred to, was a decree in a contested suit decided on the 25th of May, 1920, in which the existence of a customary right of pre-emption was affirmed in favour of co-sharers in villages Kusmaha and Kanail. From the judgment which is on the record it would

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seem that this was a claim of pre-mortgage, although the decree as printed suggests an ordinary claim to pre-empt a sale. At any rate it is quite certain that the learned Additional District Judge who decided that case in appeal did not touch upon the question which has caused us most difficulty, namely, the correct interpretation of the entries in the *wajib-ul-arz* of 1860 for the villages of Kusmaha and Kamail. He assumed throughout his judgment that if there was a customary right of pre-emption at all in those villages, it must apply to mortgages as well as to sales. Under the circumstances we cannot treat his decision as a particularly strong piece of evidence in favour of the existence of the customary right pleaded by the plaintiff in this case. The conclusion we come to is that the plaintiff has not proved to our satisfaction the existence of the customary right upon which his claim is based. We set aside the decree of the court below and in lieu thereof dismiss this suit with costs throughout.

Appeal allowed.

REVISIONAL CRIMINAL.

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January, 12.

Before Mr. Justice Walsh.

EMPEROR *v.* MAHADEO PRASAD.*

Act No. I of 1872 (Indian Evidence Act), section 30—Criminal Procedure Code, section 364—Confession—Statement of accused in answer to questions put by court—Use of statement against a co-accused.

Where two persons are tried together, one as the thief, the other as the receiver of property stolen, and at the close of the case for the prosecution there is no evidence at all against the receiver, it is not competent to the court to take into account against the receiver a statement made by the thief in answer to questions put by the court and to convict him on the strength of it.

The expression "proving a confession" is inapplicable to the procedure where a judge asks questions and an accused person gives explanations under a special section provided for that purpose. *Queen Empress v. Pirbhu* (1) and *Queen-Empress v. Pattu* (2), referred to, and *Queen Empress v. Chirnu Pandey* (3), discussed.

THE facts of this case are fully set forth in the judgment of the Court.

Mr. G. H. Dillon, for the applicant.

* Criminal Revision No. 600 of 1922, from an order of Gopal Das Mukerji, Sessions Judge of Cawnpore, dated the 9th of November, 1922.

(1) (1893) I. L. R., 17 All., 521.

(2) (1900) I. L. R., 23 All., 55.

(3) (1899) I. L. R., 23 Mad., 151.

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The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

WALSH, J. :—This conviction cannot stand. As an appellate court one would be bound to overrule it without hesitation. There is certainly a strong element of doubt. The fact that this is a revision application does make a difference and compels me to express an opinion about the procedure as well as about the actual findings.

The case is so exceptional that nothing like it will probably occur, at any rate, for some time, and I am not doing more than expressing an opinion, although I have had the advantage of arguments from two of the leading members of the bar and have been referred to one or two cases. The case against Mahadeo was built up upon two statements of one of the original thieves, a man named Jhit, who has already been sentenced to a well-merited thrashing which I hope he has received. These two statements must be clearly differentiated. The theft took place on the 14th of August. On the 16th, Jhit, who was only a carrier, confessed and made a formal confession under section 164. There is not a word against the present applicant Mahadeo in that statement. Jhit was not made an approver, but was put upon his trial together with the receiver, and evidence was called, which, if you accept a subsequent story told by Jhit, contained certain statements tending to support parts of Jhit's statement though also tending to support Mahadeo's defence. But the evidence of the witnesses at the trial before the Magistrate contained not one word tending to show that Mahadeo had bought or taken possession of these goods knowing them to be stolen. That being so, the case for the prosecution closed without a scrap of evidence against Mahadeo. Nobody seems to have noticed this singular fact, but the Magistrate's duty undoubtedly was to dismiss the case against Mahadeo at the close of the case for the prosecution. The trial proceeded and the defence was opened and the statements of the accused were taken under section 364, and then, for the first time, Jhit made a statement implicating Mahadeo, as a matter of fact treating Mahadeo as the principal person concerned in purchasing the goods. This statement has all along been called a confession and has been treated as a confession admissible against the co-accused Mahadeo under section 30 of the Evidence Act. In other words, the legal proposition may be simply stated in these words, that where

there is no evidence at all against a receiver, at the close of the case for the prosecution a statement made by the thief in his own defence may be taken into account even against the receiver under section 30. To my mind that is an untenable proposition. It is certainly contrary to the fundamental principles upon which criminal law is administered in England and, I believe, also in India, where the procedure, though different in detail, is largely based upon English ideas. In the first place an accused is entitled to know what the evidence against him is before he is called upon for a defence at all, and the closing of the case for the prosecution is no mere form but, with certain exceptions, closes the door to any further evidence against the accused. In the second place, the prosecutor cannot re-open his case and make additions to it except such voluntary additions as the accused may make himself. Now, according to the established practice in England and the established practice consistent with the first principles of criminal law, evidence cannot be received against an accused person which he has no power to submit to cross-examination. Secondly, an accused person cannot himself give evidence. Nobody could pretend that the administration of justice would be assisted if upon one accused making a confession implicating his colleague in the dock, his colleague were thereupon allowed to cross-examine him, and there is nothing in the Procedure Code suggesting such a proceeding. Every Judge in such a case in England, where statements are made from the dock after the case for the prosecution is closed, warns the jury that they must not take into account anything which one accused in the dock may say about the other. To use, therefore, a statement made in the dock by one accused against the other in a joint trial, offends against at least two of the fundamental principles of the criminal law. The Legislature in India saw fit to create an exception which is contained in section 30 of the Evidence Act. In my opinion that must be construed with reference to the fundamental principles to which it creates an exception. If the section is carefully read, I think nobody, bearing in mind the fundamental principles which I have just mentioned, ought to have any difficulty in coming to the conclusion that what is contemplated is formal proof by the prosecution of a confession previously made. The only objection I can see to such an interpretation is that I am inserting in the section the words

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"as part of the case for the prosecution." But such words would be tautologous, and a draftsman, in my opinion, would consider it superfluous to insert them, because the only thing that an accused person has to meet in a criminal trial is the case for the prosecution and such additions thereto as he may have voluntarily added by his own statement and those of the witnesses whom he calls in his defence. My view of the meaning of the language may be stated in this way. A prudent prosecutor, when the date is fixed for trial, asks himself: "What have we got to prove?" The duty of the prosecution is to prove all relevant facts essential to establish the guilt of the accused person. But matters of proof must be facts which are in existence at the time when the charge is made, and the expression "proving a confession" is, to my mind, inapplicable to the procedure where the Judge asks questions and an accused person gives explanations under a special section provided for that purpose. The two decisions which have been referred to by *Mr. Dillon*, which seem to me to strengthen my view, as a matter of general principle, but which have really proceeded on another ground, are the case of *Queen Empress* v. *Pirbhu* (1), and the case of *Queen Empress* v. *Pattu* (2). I am aware that in the case of *Queen Empress* v. *Chinna Pancha* (3), a different view has been taken, but with due respect to the learned Judges who dealt with the point there, they do not seem to me to have noticed the difficulty which I feel. At any rate it was not argued, possibly nobody thought it worth taking. They proceeded on the question whether, in the case of a man who has pleaded guilty, his trial is over at a particular moment. Allahabad and Madras differ upon that point. It does not seem to me to turn on the question at what period the trial is over. It seems to me to depend on what was meant by the language in the section as to "proving" a confession made by one of such persons. It seems to me that when you prove a confession made by a person, you tender evidence at the trial that on some previous occasion he did, in fact, make a confession, and to my mind, that is the only thing which was ever contemplated by the section. Therefore, in my judgment, although in one sense of the word it is not necessary for me to come to a conclusion, to proceed in this way was

(1) (1895) I. L. R., 17 All., 524.
(2) (1900) I. L. R., 23 All., 53.
(3) (1899) I. L. R., 23 Mad., 151.

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irregular, and there was no evidence upon which Mahadeo could be convicted at all. But I think that I ought not to pass it by as though it was a proceeding which met with my approval, because it meets with my very strong disapproval.

On the assumption that the evidence was admissible, there is some sort of a case against Mahadeo. It is very thin. It is open to many criticisms. For example, the story that Jhit told on the second occasion, during his trial, is not only inconsistent with but utterly destructive of the first story that he told, and except that he got seven annas as wages, he does not pretend to allege what price Mahadeo gave for the cow, whom he paid, or what became of the money. It is difficult, therefore, to deal with a story which is merely a thing of shreds and patches, and the two courts between them appear to have filled up what was wanting in Jhit's second statement, by assuming that the statements of Mahadeo were untrue. Even if the Magistrate's decision were right, he found that Mahadeo had dishonestly bought the goods from Babu Lal. It did not occur to the Sessions Judge that when he acquitted Babu Lal, this knocked the bottom out of the case against Mahadeo as the Magistrate had found it. Sitting as an appellate court I should have differed from the unfavourable inference which the Judge has drawn from the alleged partnership of Musammat Janki and Mahadeo. He may be right, but before one convicts a possibly respectable man, one ought to be quite sure, and if it is possible and consistent with all the evidence that Janki, being not too well off and already being assisted with either advances or help from Mahadeo, approached Mahadeo, seeing her way to making something out of the stolen property, and used him as a tool in order to enable her to complete the fraud, and if he trusted her, the fact that she came with the goods would, of course, naturally encourage him and increase his sense of security. I think an unfair method of dealing with the case has been adopted in both courts in treating the case against Janki and Mahadeo as though they necessarily stood or fell together. They ought to have been examined quite independently. It is true, of course, that Mahadeo's admission that the goods were brought to his premises and were handled for the purpose of selling, and even unpacked and repacked on his premises, is corroboration of Jhit. But it is only corroboration of a part of Jhit's story. It is no corroboration of that part of Jhit's story which, if he ever said it, consisted

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of the statement that Mahadeo knew that the goods were stolen, or purchased property which he suspected to be stolen. Judges should use some discrimination when they are dealing with ambiguous evidence which may have an honest or a dishonest interpretation. In such a case there is no corroboration unless the conduct of the accused, or the admission of the accused, goes to the full length of [illegible] inconsistent with honest dealing. The mere fact of the presence of some raisins and some of the packing material in which the goods were originally packed for transit by the consignor, is no corroboration of Mahadeo's guilty knowledge. It is corroboration of the statement that the goods were unpacked at his premises. But that is Mahadeo's defence and his reason for not having entered into this transaction. Another illustration is that whereas nobody said that he had bought the goods at all, he himself said that he had agreed to buy them and eventually decided not to and sent them away. Under these circumstances the remark of the learned Judge in his judgment about the absence of an entry of the transaction in Mahadeo's book, when Mahadeo himself denied that any such transaction took place, can only be due to a sort of instinctive feeling on the part of the Judge that Mahadeo's guilt was made out and a desire to support that view by some sort of logical reasoning. As a matter of fact, books in such a case are utterly unimportant because if no transaction took place, there would be no evidence. On the other hand, if the transaction was a dishonest one for a contemptuous price, the entry would probably be cooked in order to conceal the disproportionate price. There is another matter which both courts failed to investigate, namely, whether, on any showing, Mahadeo dealt in these goods at a price which showed he must have known he was running a considerable risk. If anything, the evidence points rather in the other direction, but as no transaction is proved to have taken place, it would be hard to come to a definite conclusion even on that point. In my view the conviction is bad and must be set aside. I, therefore, allow the application in revision and acquit the accused. The bail bond is discharged.

I may say that if anybody connected with this case comes before me in consequence of anything I have said today, I shall probably hold that he is too late to apply for revision.

Application allowed.

APPELLATE CRIMINAL.

Before Mr. Justice Walsh and Mr. Justice Ryves.

EMPEROR *v.* MUSAMMAT ANANDI.*

1923 January, 24.

Act No. XLV of 1860 (Indian Penal Code), section 84; Act No. I of 1872 (Indian Evidence Act), section 105; General exceptions; burden of proof.

Although the law lays down that the onus of proving circumstances which give the benefit of a general exception to an accused person lies on him, and in the absence of evidence the presumption is against the accused, this does not mean that the accused must adduce evidence. If it is apparent from the evidence on the record, whether produced by the prosecution or by the defence, that a general exception would apply, then the presumption is removed and it is open to the Court to consider whether the evidence proved to its satisfaction that the accused comes within the exception.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Ram Nama Prasad*, for the appellant.

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

RYVES, J.:—Musammat Anandi was convicted by the learned Sessions Judge of Muttra of the murder of a boy, Har Charan, and sentenced to transportation for life. She has appealed. There is no doubt whatever that the child Har Charan was left alone in the house with Musammat Anandi on the morning of the 19th of October, 1921, while the other women inmates of the house had gone to the village well. The male members of the family were already out at work in the fields. When the women returned from the well they found the outer door chained from the inside. It was opened by the accused, and they noticed blood about, and on the cot on which the child had been sleeping when they left the house they found the dead body of the child with its throat cut. The accused apparently was in the same room. They asked the accused what she had done and she said that she had destroyed Poorna's issue. A report was made and the accused was taken into custody that same day. It is in evidence that she attempted to run out of the house either with the intention of [illegible] or of jumping down a well. She was caught, however, and tied up by the chaukidar. After being taken to the police station it appears that she was sent to the jail at Muttra, and we find that on the 11th of November, 1921, a letter was sent by the Joint Magistrate in the Civil Station of Muttra asking whether Musammat Anandi was capable of standing her trial

* Criminal Appeal No. 964 of 1922, from the order of [illegible], Sessions Judge of Muttra, dated the [illegible] of November, 1922.

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This shows that before that the police must have had doubts about the matter. On the 6th of December the Civil Surgeon replied that she was unable to plead or stand her trial, and on the 6th of December the District Magistrate ordered her trial to be postponed as she was ill. On the 2nd of February the Civil Surgeon of Muttra reported that she was insane, with the result that she was removed from the jail at Muttra to the lunatic asylum at Agra and she remained there until the 23rd of August. Subsequently it was certified that she had recovered her senses and could stand her trial. The main facts of the case are not disputed and they are all recorded in the judgment of the learned Sessions Judge. The only question is whether Musammat Anandi, who undoubtedly killed the child, was guilty of murder or whether she was protected by the provisions of section 84 of the Indian Penal Code. There is no doubt that the law requires, as laid down in section 105 of the Indian Evidence Act, that the onus of proving circumstances which give the benefit of the general exception to an accused person lies on him, and in the absence of evidence the presumption is against the accused. But this does not mean that the accused must lead evidence. If it is apparent from the evidence on the record, whether produced by the prosecution or by the defence, that the general exception would apply, then the presumption is removed and it is open to the court to consider whether the evidence proves to the satisfaction of the court that the accused comes within the exception. Now here it is established by the evidence of two qualified expert medical witnesses that at any rate from shortly after the 19th of October, 1921, until the 23rd of August, 1922, the woman was not in her senses. There is evidence that her father, and some evidence that her grandfather, had been at one time or another insane. There is also evidence that before the murder she occasionally went out of her mind. In other words it is proved that she was subject to occasional fits of insanity. Now the court has to consider whether it is established by the evidence that the murder was committed at a time when she was in this state or not. The learned Judge comes to the conclusion that she has not proved that she was, and that the onus lay on her to do so. He draws an adverse inference against her from the circumstance that after killing the child she closed the main door of the house, that she then changed the skirt which she had been wearing when she killed the child and washed it in

an attempt to remove blood stains, and when discovered she attempted to run out of the house in order to throw herself into a well. He says that her washing the skirt and running out of the house to throw herself into a well are evidence of the concealment of her guilt in order to escape punishment. We draw quite a different inference from these acts of hers. It was at the most a half-witted attempt at concealment while all the time the body of the child was lying in the room with its throat cut, for any one to see who entered. The most important circumstance against the woman appears to be that the *darogha* when he questioned her that day received what he considered rational answers, and that at that time her relations did not tell him that she had suffered from unsoundness of mind on occasions. It seems to us that from the previous history of the accused before the murder and from her family history followed by the proof that very shortly after the murder and for several months subsequently she was insane, and from the want of real motive for the murder itself and the woman's conduct immediately after it, there is sufficient evidence in our opinion that the woman was not accountable for her actions when she killed the child. In our opinion, therefore, when she killed the child she was of unsound mind and cannot be convicted of murder. We, therefore, acquit her of the offence of murder, but under section 471 of the Criminal Procedure Code we declare her to be a criminal lunatic within the meaning of Act IV of 1912 and direct her to be kept in safe custody in the jail at Mutra, or if the Superintendent of such jail thinks better, in the lunatic asylum at Agra until the Local Government makes further orders in the case.

WALSH, J.:—In consequence of what has fallen from the Assistant Government Advocate, namely, that this person is said now to be sane, it is necessary to remove any misconception which may be created by that observation. It is the duty of the appellate court, when the trial court falls into an error in the performance of its duty, to decide whether or not at the time the act was committed, the accused was capable of understanding the nature of her act. We are satisfied that she was not. We have, therefore, an absolute duty imposed upon us to make an order in accordance with the statutory provisions of the law. We have no alternative and we are not concerned with the consequence. We are dealing with an alleged murder committed thirteen or fourteen months ago. If the result of

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proper treatment, first in jail and second in a lunatic asylum provided with expert assistance and intended for the purpose of applying remedies to demented persons, is that the person becomes comparatively well again, that is not a matter which concerns us. The future orders for the disposition of this person rests, not with us, but with the authorities who have charge of persons who are mentally unfit. I would just add that, although it would be wrong to say that the Judge has not taken sufficient care, because he has indeed written a very long and apparently careful judgment he has unfortunately utterly failed to get to close quarters with the essential and fundamental facts of the case. It is idle to talk about a person attempting to conceal a crime by changing a skirt, when all the evidence of the crime including her proximity to the corpse, were evident for all the world to see. There was no attempt at concealment, and changing a skirt seems to me merely the feeble attempt of a half-witted person to do that which a deliberate criminal might do as part of a real effort at concealment. Further, I would observe that Judges should be a little more careful on questions of scientific evidence and be guided by the opinion of trained experts. The result of the first Civil Surgeon's observation was brought about by a special request made to him by the Magisterial authorities to keep an observation upon this person, and two experienced Civil Surgeons, trained from their youth to observe, and form opinions upon matters upon which the learned Judge has probably no adequate training or information of his own, expressed a very strong opinion that this person was mentally unfit for something like nine or ten months. How under these circumstances a learned Judge could persuade himself that the medical evidence did not help the defence, I am at a loss to understand. I agree with the order proposed.

REVISIONAL CIVIL.

Before Mr. Justice Lindsay.

1923

January, 25.

GADRE (DEFENDANT) *v.* BRIJNANDAN SARAN (PLAINTIFF).*

Act No. IX of 1887 (Provincial Small Cause Courts Act), section 17—Small Cause Court suit dismissed ex parte—Application for restoration presented to wrong court and there retained until time for filing had expired—Limitation—Act No. IX of 1908 (Indian Limitation Act), sections 5 and 14.

Held that neither section 5 nor section 14 of the Indian Limitation Act, 1908, would apply to the case of an application for restoration under

* Civil Revision No. 136 of 1922.

section 17 of the Provincial Small Cause Courts Act which had been filed in a wrong court and there detained beyond the prescribed period of thirty days.

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GANAK v. NARAYAN SAHAY.

THIS was an application in revision against the order of the Second Subordinate Judge of Cawnpore, exercising powers of a Small Cause Court Judge. The facts of the case sufficiently appear from the order of the Court.

Munshi *Girdhari Lal Agarwala*, for the applicant.

Munshi *Gulzari Lal*, for the opposite party.

LINDSAY, J.:—This is an application for revision of an order passed by the Second Subordinate Judge of Cawnpore in exercise of Small Cause Court powers.

On the facts stated the case is a hard one on the applicant for revision, but I have come to the conclusion, after hearing the learned counsel, that it is not possible for me to interfere.

The facts are as follows:—The applicant here was the defendant in a suit which was brought for the recovery of arrears of rent. That case was instituted in the court of the Judge, Small Cause Court of Cawnpore.

Under an order of the learned District Judge the case was transferred for disposal to the court of the Second Subordinate Judge of Cawnpore and it was decided *ex parte* on the 28th of June, 1922.

The Second Subordinate Judge of Cawnpore on this date was Babu Aghore Nath Mukerji.

On the 28th of July, 1922, the defendant filed an application to have the *ex parte* decree, which had been passed against him, set aside. This application was admittedly presented to Babu Aghore Nath Mukerji, who on this date had become Judge of the Small Cause Court at Cawnpore.

In accordance with the provisions of section 17 of the Provincial Small Cause Court Act, the defendant along with his application made an offer to furnish security, and there can be no doubt that Babu Aghore Nath Mukerji, by his order of the 28th of July, 1922, accepted the security which was tendered by the defendant.

No order regarding the application to set aside the *ex parte* decree seems to have been passed by Babu Aghore Nath Mukerji until the 11th of August, 1922, when, on the (trench) of an office report, he passed an order directing the application to be returned for presentation in the proper court, that is

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to say, the court of the Second Subordinate Judge of Cawnpore.

The application was taken to the Second Subordinate Judge and was received by him on the 12th of August, 1922.

By that time more than thirty days had elapsed since the date on which the *ex parte* decree had been passed and the Second Subordinate Judge, Mr. Said-ud-din, rejected the application on the ground that it had been presented after time.

It is argued here in support of the application that the application was not time-barred, and it is claimed that the period during which the application lay in the court of the Small Cause Court Judge at Cawnpore ought to be excluded.

I am unable to accept these arguments. There can be no doubt that the limitation for an application of this nature was thirty days, and, in my opinion, the court below was correct in saying that there is no authority in the Limitation Act for extending the period for presentation. Section 5 of the Limitation Act clearly does not apply to a case of this kind, nor can the period during which the application lay pending in the court of the Judge of the Small Cause Court be excluded. The only section which deals with the exclusion of the period during which such a case is pending in another court is section 14 of the Limitation Act, but that section does not apply to applications.

It is, therefore, quite clear that there is no error of law in the order which is passed by Mr. Said-ud-din and of which revision is here sought. It is a most unfortunate thing that Babu Aghore Nath Mukerji thought fit to hold up this application in his court from the 28th of July to the 11th of August without passing any order upon it. The result of the negligence of the Judge has been to put the present applicant out of court; by the time the application was ordered to be returned to him for presentation in the proper court, the period of limitation had expired.

Further, it is to be noticed that Babu Aghore Nath Mukerji acted improperly on the 28th of July, 1922, in accepting the security which was offered by the applicant. The Judge had no right to accept security if he had no jurisdiction to deal with the application, as he afterwards found. The case is a most unfortunate one, but, under the law, I am unable to give the applicant any relief.

There is no illegality in the order which is now complained of. I cannot, therefore, interfere with it under the provision of section 25 of the Small Cause Court Act. The application, therefore, fails and is dismissed. I make no order as to costs.

Application disallowed.

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GAURI v. BRIJNANDAN SARAN.

APPELLATE CIVIL.

Before Mr. Justice Walsh and Mr. Justice Ryves.

1923 *January*, 25.

INAYAT HUSAIN AND OTHERS (DEFENDANTS) v. FAIZ MUHAMMAD AND OTHERS (PLAINTIFFS).*

Civil Procedure Code, section 92—"Public right"—Suit for possession of an imambara—Plaintiffs setting up their own appointment as trustees and the previous dismissal of the defendants.

Held that section 92 of the Code of Civil Procedure would not apply to a suit where the plaintiffs claimed possession of an *imambara* upon the allegation that they had been legally appointed trustees of the *imambara* and that the defendants—the former trustees—had been legally dismissed and were thenceforward merely in the position of trespassers *Muhammad Abdul Majid* v *Ahmad Said Khan* (1) and *Ayat-un-nessa Bibi* v. *Rahja Khadija* (2), followed; but the former case doubted by WALSH, J.

THIS was a suit in which the plaintiffs claimed possession of an *imambara* upon the ground that they were the duly appointed trustees thereof and that the defendants, the former trustees, had been properly dismissed, and were then only in the position of trespassers The sole question in the case was whether the suit was one to which section 92 of the Code of Civil Procedure was applicable. The court of first instance (Additional Subordinate Judge of Agra) decreed the suit. The defendants appealed, urging that section 92 applied and that the suit as brought was not maintainable.

The Hon'ble Munshi *Narain Prasad Asthana*, for the appellants.

Hafiz *Mushtaq Ahmad* (for Dr. *S. M. Sulaiman*), for the respondents.

WALSH, J. :—In this case I can see no satisfactory answer to the view expressed in the judgment of the first court. Left to my own view, I should hold unhesitatingly that this was a suit by the plaintiffs to recover possession of an *imambara* by virtue of having been appointed as trustees in the place of the defendants, and that the order asked for involved removing an old trustee and vesting the property in the plaintiffs as trustees, and that, in bringing this suit, they were asserting, not

* First Appeal No. 129 of 1922, from an order of Harihar Prasad, Additional Subordinate Judge of Agra, dated the 18th of May, 1922.

(1) (1913) I. L. R., 35 All., 469.

(2) (1914) I. L. R., 41 Calc., 749.

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a private individual right merely, though no doubt a private individual right is involved, but a right on behalf of the community which has elected them; in other words, a general public right. This is, in substance the argument which was submitted to this Court in the case of *Muhammad Abdul Majid* v. *Ahmad Said Khan* (1), on behalf of the respondents, and if the matter were *res integra*, I should feel difficulty in following the decision in that case. But as there seems a weight of authority in support of the view taken in that case and the matter is one of no practical importance and it is desirable that the practice of the Court in these matters should be uniform, I, with considerable hesitation, agree with the order and dismiss the appeal.

REVES, J.:—I think that the question involved in this appeal is covered by authority in *Muhammad Abdul Majid* v. *Ahmad Said Khan* (1), which was a case under the present Procedure Code. Most of the previous authorities under the old Code were then considered. According to that ruling, section 92 would not apply to a suit like the present in which the plaintiffs assert that they have been appointed trustees already by the public, and that the defendants, the former trustees, have been properly discharged, and they seek possession on the ground that the defendants are now mere trespassers. This decision has been followed in the case of *Ayat-un-nessa Bibi* v. *Kulfu Khalifa* (2), and, so far as I know, has not been dissented from in any reported decision. I think, therefore, the weight of authority is against the appellants in this case. I, therefore, agree in dismissing the appeal.

BY THE COURT.—The order of the Court is that this appeal is dismissed with costs.

Appeal dismissed.

REVISIONAL CIVIL.

Before Mr. Justice Lindsay.

1923 January, 25.

LALTA PRASAD (PLAINTIFF) v. KHARGA AND ANOTHER (DEFENDANTS)*

Act (Local) No. II of 1901 (Agra Tenancy Act), sections 150, 161, 158 and 177(c)—Suit for resumption of muafi—Question of proprietary title raised in trial court—Appeal.

If in a suit for resumption of *muafi* the defendant sets up a plea based on section 158 of the Agra Tenancy Act, 1901, he is raising a question of proprietary title, for obviously if the plea is determined in his favour, he is

* Civil Revision No 78 of 1922.

(1) (1913) I. L. R., 35 All., 459

(2) (1914) I. L. R., 41 Calc., 749.

entitled to a declaration of his proprietary right. *Sundar Singh v. The Collector of Shahjahanpur* (1), referred to

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LALTA PRASAD v. KHARGA

This was an application in revision from an order of the District Judge of Farrukhabad returning, for presentation to the Commissioner, a memorandum of appeal in a suit filed in the court of an Assistant Collector of the first class for resumption of a *muafi* under section 150 read with section 154 of the Agra Tenancy Act, 1901.

The facts of the case are fully stated in the judgment of the Court.

Dr. *Kailas Nath Katju*, for the applicant.

Mr. *A. P. Dube*, for the opposite parties.

LINDSAY, J. :—This application for revision calls in question the propriety of an order passed by the learned District Judge of Farrukhabad, on the 16th of February, 1922.

The case has arisen in the following way. A suit was filed in the court of the first class Assistant Collector by Lalta Prasad, plaintiff, against Kharga and others, defendants. This suit was framed as a suit for resumption of a *muafi*, under section 150 read with section 154 of the Agra Tenancy Act (Act II of 1901).

By way of defence to the suit, the defendants pleaded (1) that the land was not capable of resumption inasmuch as it was *abadi* land and not agricultural land and (2) that by reason of certain facts they had become the proprietors of the land in question. The defendants pleaded that they had held the disputed land in circumstances which gave them the right, under section 158 of the Tenancy Act, to be deemed proprietors.

Three issues were framed by the Assistant Collector: (1) whether the land in suit was *abadi* land, (2) whether the land was resumable and (3) whether the land had been held rent-free by the defendants for more than two generations and for more than fifty years.

The learned Assistant Collector decided only issues (1) and (2). He found that the land in suit was *abadi* land and that it was not resumable under the provisions of chapter X of the Tenancy Act. He came to no finding on the third issue, *viz.*, as to whether the defendants had held the land rent-free for two generations and for more than fifty years.

The result was that the suit was dismissed. The plaintiff then went in appeal to the learned District Judge and the learned District Judge refused jurisdiction, being of opinion

(1) (1911) I. L. R., 33 All., 653.

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that the only question which was before him was whether or not the land in suit was land under the Tenancy Act. He held that there was no question of proprietary title or jurisdiction before him. He accordingly returned the memorandum of appeal for presentation to the Commissioner.

The argument here is that the learned District Judge was wrong in declining jurisdiction. In my opinion this contention must be upheld. Section 177 of the Tenancy Act describes the cases in which an appeal lies to the District Judge from the decree of an Assistant Collector of the first class. It is declared by this section that in all suits in which (c) a question of proprietary title has been in issue in the court of first instance and is a matter in issue in the appeal or (d) a question of jurisdiction has been decided, the appeal lies to the District Judge. It has been argued before me that this suit was one of the suits described in group C which is mentioned in schedule 4 to the Tenancy Act. That, no doubt, is true; but the words "in all suits" in section 177 would comprise suits of any description in whatever group they may be. It cannot be argued that because this particular kind of suit falls in group C the appeal does not lie to the District Judge.

It remains to be considered whether a question of proprietary title was raised in the court of the Assistant Collector and was a matter in issue in the appeal.

I do not agree with the learned District Judge when he says that no question of proprietary title was raised. It seems to me that if in a suit for ejectment the defendant sets up a plea based on section 158 of the Tenancy Act, he is raising a question of proprietary title, for obviously if the plea is determined in his favour he is entitled to a declaration of his proprietary right. This view is supported by the judgment reported in *Sundar Singh and others* v. *The Collector of Shahjahanpur* (1).

It is clear that the question of proprietary title was raised in the court of first instance. I was rather inclined to doubt whether this question was also put in issue in the court of the District Judge, but the learned counsel for the applicant has referred me to the memorandum of appeal and, on a fair construction of the grounds of appeal, I think it may be said that the question of proprietary title was also raised in the memorandum of appeal.

(1) (1911) I. L. R., 33 All., 553.

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This being so, the case, in my opinion, falls within the purview of section 177 (c) of the Tenancy Act and the appeal lay to the District Judge, who ought not to have declined jurisdiction. The result, therefore, is that the application is allowed. The order of the Judge is set aside, and he is directed to receive the memorandum of appeal and to dispose of it in accordance with law. The applicants are entitled to the costs of this application against the opposite party.

Application allowed.

FULL BENCH.

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January, 26.

Before Sir Grimwood Mears, Knight, Chief Justice, Justice Sir Pramada Charan Banerji, Mr. Justice Piggott, Mr. Justice Walsh and Mr. Justice Ryves.

FATEH SINGH (PLAINTIFF) v. TIWARI GOKARNJ RAMANJI MAHARAJ (DEFENDANT).[1]

Hindu law—Hindu widow—Alienation by widow of property of deceased husband made with express consent of reversioner—Reversioner not permitted to repudiate consent on succeeding to property bequeathed.

Held that a reversioner to the estate of a deceased separated Hindu, who has expressly assented to an alienation of property forming part of the estate made by the widow in possession, cannot, on succeeding to the estate after the widow's death, repudiate his action and sue for possession of the property alienated by the widow. *Jaigrangi Singh* v. *Mamankarnika Babkish Singh* (1), *Rangasami Gounden* v. *Nachiappa Gounden* (2), *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (3), *Bai Parvati* v. *Bajubhai Manekharam* (4) and *Basappa* v. *Pakkirappa* (5), referred to.

Held also that the position of such reversioner was in no way affected by the fact that a co-reversioner, who had not consented to the alienation, had sued for and obtained a declaratory decree in respect of both the property alienated by the widow.

THE material facts of this case appear from the following order of reference and are also stated in the judgment of the majority of the Full Bench.

RYVES and GOKUL PRASAD, JJ. :—Sukhdeo and Dayanand were two brothers. Sukhdeo had a son Tulshi Ram, who married Musammat Muniaa. They had a son Daulat Ram. The property in suit belonged to Tulsi Ram. On his death he was succeeded by his son Daulat Ram. On his death his widow, Musammat Man Kunwar, got possession and on her death Musammat Muniaa, the lady who made the gift now in

[1] Second Appeal No. 980 of 1920, from a decree of P. K. Johnston, District Judge of Agra, dated the 21st of May, 1920, reversing a decree of Bans Gopal, Subordinate Judge of Mathra, dated the 20th of January, 1919.

(1) (1907) I. L. R., 30 All., 1.
(2) (1918) I. L. R., 42 Mad., 593.
(3) (1907) I. L. R., 34 Calc., 329.
(4) (1919) I. L. R., 44 Bom., 488.
(5) (1921) I. L. R., 46 Bom., 292.

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dispute. Dayanand had two sons, Kunwarpal and Ganga Ram. Juli Chand was the son of Kunwarpal. He brought a suit to set aside the gift and succeeded. He is dead. Ganga Ram had a son Fateh Singh, who is the plaintiff in the case.

Two important points are raised in this appeal. On both of them there seems to be direct conflict between Divisional Bench rulings of this Court. It seems to us that in view of two recent decisions of their [illegible] of the Privy Council it is desirable that the whole subject should be re-examined and the law laid down authoritatively for the guidance of the lower courts and the public.

A Hindu female in possession of a limited estate made a gift to the defendant-appellant. She is now dead and the plaintiff, who is the reversioner, sues for possession. He is met by the plea that shortly after the gift was made, the plaintiff executed a deed of relinquishment of all his rights in the gifted property, and, therefore, he cannot maintain the suit. The plaintiff contended that the defence was barred by the rule of *res judicata* because Juli Chand, a reversioner, had brought a suit and succeeded in getting a declaration that the gift was void.

The trial court, following the Privy Council ruling in *Amrit Narayan Singh* v. *Gaya Singh* (1), held that the plaintiff could not bargain away his expectant rights and that, as the plaintiff was not a party to the previous suit by another reversioner, he was not bound by that decision. It decreed the suit. On appeal the learned District Judge of Agra allowed the appeal and dismissed the suit. He says:—"It may be admitted that a reversioner cannot transfer his interest in the property while it is still merely a reversionary interest, but it appears that a reversioner might enter into a contract with regard to the succession which would be binding upon him. If a reversioner, for consideration, undertakes that he will not seek to set aside an alienation by a woman in possession, there does not appear to be any reason in law why he should not be bound by this contract." We may interpolate here the remark that the trial court found that there was no consideration for his relinquishment and that finding has not been reversed by the Judge. The Judge goes on to say:—"In the present case the position appears to be this, that the alienation was alleged to be in performance of the wishes of Tulshi Ram. Strictly

(1) (1917) I. L. R., 45 Calc., 590.

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speaking, Tulshi Ram had no power to dispose of the property after his death, and Daulat Ram received the property unfettered by any obligations. But it appears to me that, in law, if either Tulshi Ram or Daulat Ram had expressed a wish that the property should be dedicated to a religious purpose, this would be sufficient to validate the gift by Mumian. In the suit brought by Duli Chand (the former reversioner) apparently an attempt was made to prove that such a wish had been expressed and the court held that the evidence should not be believed. The present case is different. The so-called *dasthardari* shows that the present plaintiff assented to the transfer. This creates a presumption against him that the transfer was for a lawful reason In my opinion, even if there be no estoppel of the plaintiff, it was for him to prove that neither Tulshi Ram nor Daulat Ram had expressed a desire that the property should be dedicated. The execution of the *dasthardari* shifted the burden of proof with regard to legal necessity."

It seems to us that the learned Judge was thinking of the case of *Bajrangi Singh* v. *Manoharnika Baksh Singh* (1); but, as explained in *Abdulla* v. *Ram Lal* (2), that ruling is not applicable to gifts. As explained by later rulings of the Privy Council, *e.g.*, in *Hari Kishen Bhoot* v. *Kashi Pershad Singh* (3), the consent of a considerable body of reversioners or the nearest reversioners creates a presumption that a transfer such as a sale or mortgage by a Hindu female with a limited estate is justified by legal necessity, but there can be no legal necessity for a gift. The fact that the gift in the present case was made to an idol does not seem to us in any way worth consideration because, although it has been held that a Hindu widow may justifiably make a gift of a portion of the husband's estate for religious purposes, that rule will not apply in this case where the bulk of the husband's estate was given to the idol.

On the second point the learned Judge held that the rule of *res judicata* did not apply.

The rulings on both these points, which will have to be considered, are numerous.

On the one hand the recent decision in *Mahadeo Prasad Singh* v. *Mata Prasad* (4) is in direct conflict with the view

(1) (1907) I. L. R., 30 All., 1
(2) (1911) I. L. R., 34 All., 199
(3) (1914) I. L. R., 42 Calc., 876.
(4) (1921) I. L. R., 44 All., 44.

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of *Abdulla* v. *Ram Lal* (1) and other cases. We may note that in *Mahadeo Prasad Singh* v. *Mata Prasad* (2), the Privy Council case reported in I. L. R., 15 Calc., 880, was distinguished, but we doubt whether the reasons given therefor are adequate.

On the other hand there is the ruling of their Lordships of the Privy Council in *Chandrabangsa Pibi* v. *Subbammal* (3). As pointed out in the Full Bench decision of this Court reported in I. L. R., 14 All., 19, up to the publication of this decision all the decisions of this Court had been the other way, namely, that one reversioner could not claim through another reversioner, and, therefore, a suit by one reversioner did not bind any others.

We, therefore, direct that this case be laid before the Hon'ble Chief Justice with a view to form a larger Bench to hear the appeal.

Pandit *Uma Shankar Bajpai*, with him Munshi *Narain Prasad Ashthana*, for the appellant, submitted that in order that a transfer of immoveable property by a Hindu widow be binding on the reversioners, after her death, it must be either (1) for religious or charitable purposes or (2) conducive to the spiritual welfare of her husband or (3) for legal necessity. In cases (1) and (2) the transfer must be of a reasonable and small portion of the property. He cited *Chintamani Dei* v. *Baidya Nath Naik* (4) and *Sham Dei* v. *Bishbadra Prasad* (5).

In the present case the property conveyed was about two-thirds of the whole. Therefore the transfer could not be upheld on the grounds (1) and (2). Nor could it be upheld on the ground of legal necessity because it was a gift pure and simple without any consideration. The lady in her deed of endowment said that she had made the transfer in pursuance of the wishes of her husband. She had inherited the property from her son and not from her husband. No transfer made in pursuance of her husband's wishes to promote his spiritual welfare could be binding on the reversioners of the son. The transfer had been declared not to be binding on Dani Chand who was also a reversioner. That decision was *res judicata* between the parties to this case also. He referred to *Kesha*

(1) (1911) I. L. R., 34 All., 129.
(2) (1921) I. L. R., 44 All., 14.
(3) (1915) I. L. R., 38 Mad., 996.
(4) (1908) I. L. R., 32 Calc., 479.
(5) (1920) I. L. R., 43 All., 468.

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Prasad Singh v. *Sheo Pargash Ojha* (1). The plaintiff could take advantage of the decree in Dudi Chand's favour unless it could be shown that he had precluded himself from doing so by reason of the deed of relinquishment. That deed could operate against him either as consent or as estoppel. Consent could only raise a presumption of legal necessity. He, further, cited *Rangasami Gounden* v. *Nachappa Gounden* (2). But in a case of gift no question of necessity arose, and therefore, consent could not help the donee. He referred to *Abdulla* v. *Ram Lal* (3).

Estoppel could be disposed of on the ground that the transferee had done nothing to prejudice his position because of his (appellant's) deed of relinquishment. He did nothing which he would not have otherwise done. He had accepted the transfer before he (appellant) executed the deed of relinquishment. His consent, if given during the process of the transaction of gift, might or might not have helped him, but a consent given *ex post facto* could in no way operate as estopped against him. He was not claiming an equitable relief which was merely discretionary with the court to grant or refuse. His contention was that the widow was not competent to deal with the property in the way in which she did.

It could not be said that his relinquishment could bind him as a contract. There was no consideration for the contract. As a matter of fact he had nothing to relinquish. His only right in 1905 was a mere chance of succession, a transfer of which was prohibited by Transfer of Property Act, section 6. He relied on *Amrit Narayan Singh* v. *Gaya Singh* (4), *Jagan Nath* v. *Dibbo* (5), *Gur Narayan* v. *Sheolal Singh* (6) and *Bai Parvati* v. *Dayabhai Mancharam* (7).

Babu *Piari Lal Banerji* (with him Munshi *Girdhari Lal Agarwala*), for the respondent, submitted that it was not his case that the deed of gift was good in itself. He admitted that if Fateh Singh had not made the relinquishment, he could undoubtedly take advantage of Dudi Chand's decree. His contention was that the effect of that decree was nullified by the

(1) (1921) I. L. R., 44 All., 1.
(2) (1918) I. L. R., 42 Mad., 553.
(3) (1911) I. L. R., 34 All., 1.
(4) (1917) I. L. R., 45 Calc., 590.
(5) (1908) I. L. R., 31 All., 53.
(6) (1918) I. L. R., 46 Calc., 945 at p. 949.
(7) (1919) I. L. R., 44 Bom., 481.

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consent given by Fateh Singh, who had thus precluded himself for ever from questioning either the validity or the extent of the gift.

In all the cases cited on behalf of the appellant the person questioning the alienation was some one other than the person who gave his consent. On examining the authorities, it would be found that the consenting reversioner had never been allowed to question the transaction. He relied upon *Rameshwar* v. *Lalman* (1), *Ismail* v. *Jagannath* (2), *Mata Prasad Shukul* v. *Devi Shukhain* (3) and *Mahadeo Prasad Singh* v. *Mata Prasad* (4).

The case of *Dai Parvati* v. *Popatbhai Manchharam* (5) could be distinguished. In that case the widow had transferred her life-estate and the reversioner had transferred his reversionary rights. It was held that the reversionary right was not transferable. Moreover, the question of estoppel was not argued in that case. The case was subsequently explained and distinguished in *Basappa* v. *Fakirappa* (6) by the same CHIEF JUSTICE who had delivered the judgment in the former case. The Allahabad High Court refused to follow the former case in *Mahadeo Prasad Singh* v. *Mata Prasad* (4).

The case of *Gur Narayan* v. *Shadal Singh* (7) was also distinguishable. In that case a remote reversioner, who had given his consent to a transfer by a widow, was allowed to question the transaction not in his own capacity, but as a legal representative of the actual reversioners who had not given their consent to the transfer.

It was held in *Pairangi Singh* v. *Mawakarnika Bakhsh Singh* (8) that a consent, even when given after the transaction, would operate as an estoppel.

The fallacy in the appellant's argument was that he confined the use of the word "estoppel" to the rule given in section 115 of the Evidence Act. Estoppel as a rule of equity was much wider than the rule of evidence given in section 115. As a rule of substantive law estoppel meant that a party who had once taken one position could not afterwards be allowed to

(1) (1916) F. A. O. No. 80 of 1915, decided on 24th Feb.
(2) (1913) 19 Indian Cases, 255
(3) (1920) 58 Indian Cases, 570.
(4) (1921) I. L. R., 44 All., 44.
(5) (1919) I. L. R., 44 Bom., 488.
(6) (1921) I. L. R., 46 Bom., 292.
(7) (1918) I. L. R., 46 Calc., 950.
(8) (1907) I. L. R., 30 All., 1.

assume a different one. He relied upon Caspersz on Estoppel, 4th Ed., p. 19.

The gift being in favour of the family idol whom Fateh Singh himself described as his "Ishi Deva," was for religious purpose, and thus it was not of a nature absolutely void. The question would be whether Musammat Munian exceeded the limits of a valid disposition of property for a religious purpose. This question Fateh Singh was estopped from raising.

The current of authorities on this point was all one way, and on the principle of *stare decisis*, if on account of nothing else, a departure should not be made in this case.

Pandit *Uma Shankar Bajpai*, in reply, submitted that in all the cases cited on behalf of the respondent either consideration had passed to the consenting reversioner in some form or another, or the transferee had altered his position. No plea was taken by the defendant in his written statement to the effect that the consent was given at the time of transfer or that the deed of gift by Musammat Munian was written with the consent of Fateh Singh.

MEARS, C. J., BANERJI, PIGGOTT and RYVES, JJ.:—This second appeal raises certain questions regarding the position of a reversioner who has succeeded to immovable property on the death of a Hindu widow, in respect of an alienation by way of gift or endowment made by the said widow. The essential facts may be stated as follows. The property with which we are concerned belonged to one Tulsi Ram, who died leaving a son, Daulat Ram. The latter died childless and was succeeded in the possession of the property, first by his own widow, Musammat Man Kunwar, and, afterwards, by his mother Musammat Munian, the widow of Tulsi Ram. On the 19th of April, 1905, Musammat Munian made a gift of certain immovable property in favour of the family idol, who is impleaded as the defendant in this suit, which is contested by Mahant Puran Das, the manager of the temple in which the idol is installed. At the time of this transfer the nearest reversioners to the estate of Daulat Ram were the grandsons of one Daya Nand, who was the own brother of Sukhdeo, the father of Tulsi Ram. On the 12th of May, 1905, two of these reversioners, by name Fateh Singh and Sundar, executed a document which has been referred to in the pleadings and arguments as a deed of relinquishment. The third reversioner, by name Duli Chand,

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instituted a suit, in the year 1907, claiming a declaration that the transfer effected in favour of the idol was not valid beyond the life-time of Musammat Munian and would not bind the reversioner or reversioners who might succeed to the estate on that lady's death. He obtained, after contest, a decree granting him the declaration sought for. It is not suggested that there was any kind of fraud or collusion in connection with the passing of this decree in favour of Duli Chand. Musammat Munian lived until the 12th of December, 1916. When she died the succession opened in favour of Fateh Singh and Duli Chand, Sundar having died in the interval. For some reason with which we are not concerned, Duli Chand has, up to the present, taken no effective steps to recover possession of any part of the property covered by the deed of gift of the 19th of April, 1905. The suit out of which this appeal arises was instituted by Fateh Singh on the 31st of July, 1918. The plaintiff asserts that he is actually in possession of some of the property covered by the deed of gift of the 19th of April, 1905 but he claims to recover a one-half share of the remainder, admitting that the other half share has passed by inheritance to Duli Chand. The suit was resisted on various grounds, with two of which only we are now concerned. It was contended on behalf of the plaintiff that the decree in favour of Duli Chand in suit No. 163 of 1907 was conclusive as to the invalidity of the gift beyond the life-time of Musammat Munian, so that the court was bound to accept that decision and to decree the plaintiff's claim accordingly. On behalf of the defendant it was denied that the decree in favour of Duli Chand could operate as *res judicata* in favour of Fateh Singh in respect of any of the questions raised. It was further contended that, in any event, Fateh Singh was bound by the terms of his own deed of relinquishment of the 12th of May, 1905, and was, therefore, debarred from contesting the validity of the alienation.

The case was argued before a Bench of two Judges, by whom it was referred to a Full Bench in order that the questions of law raised might be finally determined.

The question regarding the effect of the decision in favour of Duli Chand in suit No. 163 of 1907 need not detain us long, indeed it was not argued before us. In the case of *Keshio Prasad Singh* v. *Shco Parugsh Ojha* (1), it was held that, on

(1) (1921) I. L. R., 44 All., 19

the principles laid down by their Lordships of the Privy Council in *Venkatanarayana Pillai* v. *Subbammal* (1), a decision in favour of one reversioner in a declaratory suit such as that brought by Duli Chand would ordinarily, in the absence of fraud or collusion, bind the whole body of reversioners. We are satisfied that we could have treated the judgment in favour of Duli Chand as conclusive in respect of all matters actually decided in that litigation. The point is not really material, so far as the result of the present appeal is concerned. By way of precaution, in order that the other point which we have to decide with respect to the deed of relinquishment of the 12th of May, 1905, might come before us as a definite question of law, clear of all possible controversy as to matters of fact, we remitted certain issues for further investigation by the lower appellate court. One result of this has been a finding that the gift made by Musammat Munian in favour of the defendant idol covered about two-thirds of the estate in the possession of the said donor as a Hindu widow. We have no doubt that such an alienation, for the purpose stated in this deed of gift, could not be justified *per se* and that the suit brought by Duli Chand was rightly decided.

We are equally satisfied, however, that the decision in Duli Chand's suit did not, and could not, determine the further question which arises in the present litigation, namely, whether Fateh Singh personally, by reason of the deed of relinquishment of the 12th of May, 1905, is precluded from raising the question whether or not Musammat Munian had exceeded her powers of alienation in making the gift in question. The trial court seems to have relied principally on certain dicta in the decision of their Lordships of the Privy Council in the case of *Amrit Narayan Singh* v. *Gaya Singh* (2). Undoubtedly this is authority for the proposition that, when he joined in the execution of this deed on the 12th of May, 1905, Fateh Singh possessed no interest in the property therein referred to which he could assign or relinquish; his right became concrete only on the demise of Musammat Munian, until then it was a mere *spes successionis*. Without in any way questioning the correctness of this principle, we are nevertheless of opinion that the lower appellate court, the learned District Judge of Agra, was right in holding that Fateh Singh is so bound by the terms of his own deed of the 12th of

(1) (1915) I. L. R., 38 Mad., 406.
(2) (1917) I. L. R., 45 Calc., 390.

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May, 1905, that he cannot successfully impugn the alienation to which he then gave his unqualified assent. We have examined this document and we find that it is drawn up in the most possible terms. The two [illegible] Fateh Singh and Sundar, purport to renounce whatever rights and relinquish whatever interest they might conceivably possess under the Hindu law in respect of the [illegible] covered by the deed of gift; but they do even more than this. They expressly covenant that at no time hereafter will either of them, or their heirs, successors or assigns, set up any right or claim whatsoever to the property gifted at the foot of the deed, which is of course the property conveyed to the defendant idol by Musammat Munian in her deed of the 19th of April, 1905.

One minor matter in controversy was whether Fateh Singh and Sundar received any consideration for the execution of this deed of relinquishment. We have obtained a finding from the District Judge that no such consideration passed. We are not concerned with the question of the correctness of this finding. In this deed of relinquishment itself the executants state that their motive for executing the same is that the gift was one in favour of the tutelary deity of the family and they purport to be actuated by pious and religious motives. We are content to deal with the matter on this footing.

On the question of law involved we were referred, in the course of argument, to a number of decided cases; we do not think it will be necessary for us to refer to more than a few of these. The latest decision of this Court is clearly in favour of the defendant idol. The learned Judges who decided the case of *Mahadeo Prasad Singh* v. *Mata Prasad* (1), after a review of previous authorities, held that a reversioner who had joined in making, or had ratified, a particular transfer by a Hindu widow could not, in the event of the succession opening in his favour, be permitted to question the validity of that transfer. We appreciate the fact that one of the reasons for the reference made to a Full Bench in the present case was to have the decision above quoted fully considered and discussed; but the respondent is clearly entitled to have it noted that the latest authoritative pronouncement of this Court on the question in issue is directly in his favour. Much of the argument before us has turned upon two cases of the Bombay High

(1) (1921) I. L. R., 44 All., 44.

Court *Bai Parvati* v. *Dayabhai Manchharam* (1) and *Basappa* v. *Fakirappa* (2). The first of these decisions may fairly be described as the sheet-anchor of the plaintiff's [illegible] and, at first sight, it is very much in his favour. [illegible] instance of a transfer made by a Hindu widow, jointly with the reversioner entitled to succeed upon her death, being set aside, at the instance of the same reversioner, after the succession had opened. In the later case, however, the learned Judges of the Bombay High Court themselves pointed out that the decision in *Bai Parvati* v. *Dayabhai Manchharam* proceeded upon a peculiar and exceptional state of facts. The alienation there contested was made under a deed by which the widow purported to assign her life-interest only, while the reversioner purported to convey whatever rights belonged to her on the date of the execution. It was rightly held that the reversioner possessed no right capable of assignment in the life-time of the widow, and that it is not a correct proposition of law to say that the widow and the nearest reversioner between them represent the entire estate. These principles once recognized, it becomes obvious that the widow herself having conveyed nothing but her life-interest, nothing more than this could pass under the deed. In the case of *Basappa* v. *Fakirappa* (2) the learned Judges of the Bombay High Court explained their earlier decision and held that a gift by a Hindu widow of a portion of her late husband's estate in her hands as such widow, if made with the consent of the nearest reversioner living at the time of the conveyance, was valid as against the reversioner who had so consented, in the event of the succession opening in favour of the said reversioner. The learned Judges there pointed out that, with the exception of their own previous decision, which they distinguished for the reasons already explained, their attention had not been drawn to a single reported case in which a reversioner had been permitted, after he had succeeded to the estate, to challenge a conveyance made by the widow to which he had expressly assented before the succession opened. We find ourselves in the same position and it might almost be sufficient for us to say that the whole weight of authority is in favour of the respondent to this appeal. We were referred in argument to a number of cases of this Court, both reported and unreported, in which similar attempts by a reversioner who had succeeded to an estate to

(1) (1919) I. L. R., 44 Bom., 168.
(2) (1921) I. L. R., 46 Bom., 936.

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set aside a conveyance by the widow, to which he had assented, or which had been ratified by him before the succession opened, had been defeated. The argument before us really turned upon an attempt to define with precision some general principle of law upon which these decisions could all be based. We are of opinion that such a principle is to be found upon a consideration of two important decisions of their Lordships of the Privy Council, *Rajrani Singh* v. *Manbharnika Bakhsh Singh* (1) and *Rangasami Gounden* v. *Nachiappa Gounden* (2). The former was a case from Oudh, and it was an attempt to contest an alienation which had been made by a Hindu widow with the express concurrence of [illegible] the entire body of reversioners living at the time. Their Lordships repelled this attempt; but in so doing made use of expressions about which considerable controversy arose in the courts in India. For this reason their Lordships themselves, in the later case above referred to, entered upon an elaborate review of the entire question of the legal effect upon the validity of transfers made by a Hindu widow of her deceased husband's estate held by her as such widow, of the concurrence, consent or ratification of the nearest reversioners living at the time of the transfer. It is towards the close of their judgment that their Lordships laid down the principle upon which the controversy now before us ought, in our opinion, to be determined. After discussing various aspects of the question, and explaining the decision in *Rajrani Singh's* case, their Lordships entered upon this particular aspect of the question in an important passage which begins with the words, "No doubt there is another view which is not accepted, but is expressed by one learned Judge as ratification. It is scarcely that, though it might be hypercriticism to object to the use of the word. What it is based on is this. An alienation by a widow is not a void contract. It is only voidable." For this last proposition express authority is quoted in the case of *Bijoy Gopal Mukerji* v. *Krishna Mahishi Debi* (3). Their Lordships go on to point out that, if a reversioner who had actually decided to sue estate, thereupon did something which showed that he treated the alienation as good, he would lose his right of complaint. "This may be spoken of, though scarcely accurately, as ratification. In some cases it has been expressed as an election

(1) (1907) I. L. R., 30 All., 1.
(2) (1918) I. L. R., 42 Mad., 523.
(3) (1907) I. L. R., 34 Calc., 329.

to hold the deed good." They then pointed out that a presumptive reversionary heir was not bound to challenge an alienation by the widow in possession of the estate as soon as it came to his knowledge, but was entitled to wait till "the death of the widow has affirmed his character." They added, "Of course something might be done even before that time which amounted to an actual election to hold the deed good." If these words are carefully considered with reference to their context, it seems to us quite beyond question that they refer to something done by the reversioner before the death of the widow has "affirmed his character." Applying this principle, the conclusion we arrive at is that no reversioner could well have done anything before the death of the widow which so clearly amounted to an actual election to hold good the transfer effected by the widow, while in possession of the estate to which he had since succeeded, as what Fateh Singh did when he executed the deed of the 12th of May, 1905. Having made this election he cannot be permitted, now that the succession has opened in his favour in respect of half of the estate formerly in Musammat Munian's possession, to challenge the validity of the transfer which he had expressly bound himself to accept. Whether his action be spoken of as a ratification of the transfer, or as an election to hold good the deed of the 19th of April, 1905, we are satisfied that it is binding upon Fateh Singh so that he personally is not permitted to challenge its effect.

For these reasons we are of opinion that the decision of the learned District Judge of Agra was in substance correct and that Fateh Singh's suit must fail. We have before us another small matter with which it is necessary for us to deal. The respondent has petitioned this Court pointing out a small error in the decree of the lower appellate court, in which a sum of Rs. 100 paid on account of pleader's fees has been omitted, apparently by mere oversight, from the schedule of costs incurred by the respondent. We order that this omission be made good by the insertion of the said sum of Rs. 100 in the schedule. Apart from this small rectification, we affirm the judgment and decree of the lower appellate court, dismissing this appeal with costs.

WALSH, J.:—I entirely agree. In my judgment, the so-called deed of relinquishment which is not an accurate description of a deed of confirmation and consent, is an absolute

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bar to a suit by either [illegible] who claim under him, for [illegible] it is called an estoppel, [illegible] to give effect to [illegible] by their [illegible] the rule of law [illegible] by the widow [illegible] large, and could not [illegible] for religious [illegible] amount permitted by [illegible] The application, as it seems to me, [illegible] Fateh Singh, in [illegible] that it was in [illegible] tion is entitled [illegible] change the property of [illegible] to the question [illegible] finding against [illegible] District Judge, in [illegible] Full Bench has, perhaps [illegible] tion of a simple contract. [illegible] deed, the circumstances [illegible] with the deed of endowment [illegible] to confer some benefit [illegible] further, the fact that [illegible] proved, all go to show that [illegible] adequate reason [illegible] religious endowment, and that [illegible] mutual arrangements [illegible] basis of the reversion of [illegible] principle that, when such a [illegible] and, the person who by [illegible] afterwards make a claim [illegible] has been established by the [illegible] cases. The distinction between [illegible] attempt to transfer a *spes successionis* [illegible] of section 6 of the Transfer of Property Act, [illegible] by a comparison of *Bai Parvati* v. *Bapubhai Kanchhebhai* (1) with *Basappa* v. *Nikrappa* (2). The decision of the District Judge in this case has not been shown to conflict with any rule laid down by their Lordships of the Judicial Committee, and was clearly right.

(1) (1919) I. L. R., 44 Bom., 464.
(2) (1921) I. L. R., 46 Bom., 282.

The question of the effect of the decree in favour of Dulí Chand does not, in my opinion, arise, and the point was conceded at the Bar during the hearing.

Appeal dismissed.

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APPELLATE CIVIL.

Before Mr. Justice Lindsay and Mr. Justice Daniels.

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CAWNPORE COTTON MILLS CO., LD. (PLAINTIFF) v. GREAT INDIAN PENINSULA RAILWAY (DEFENDANT) *

Act No IX of 1890 (Indian Railways Act), sections 77 and 140—Suit against a Railway Company—Notice of suit—Deputy Traffic Manager empowered to deal with claims against the company, but not therefore empowered to accept notice of suit in place of the Agent

The fact that an officer of a Railway Company other than the Agent has been authorized by the Agent to deal with claims against the company for damages, does not imply that such officer is empowered to accept notice of suit in place of the Agent.

Notice of suit against a Railway Company can only be served in one or other of the three ways prescribed by section 140 of the Indian Railways Act, 1890 *Great Indian Peninsula Railway Company* v. *Chanden Bai* (1) and *Great Indian Peninsula Railway Company* v. *Ganpat Rai* (2) followed.

THE facts of this case are fully stated in the following order of remand :—

LINDSAY and STUART, JJ.:—This appeal is against the dismissal of a suit brought by the plaintiff company against the defendant, the Great Indian Peninsula Railway Company, for damages on the allegation of loss of a bale delivered to the defendant company to be conveyed from Cawnpore to Bombay. The facts appear to be as follows :—

The plaintiff company delivered twenty-six bales of foot bandages to the East Indian Railway Company at Cawnpore, on the 26th of November, 1918, for despatch to Bombay over the line of the defendant company. On the 15th of December, 1918, the consignment reached Bombay (it is alleged) one bale short. Correspondence followed between the plaintiff company and the defendant company. The plaintiff company being unable to obtain satisfaction, instituted a suit on the 14th of November, 1919, for damages in the court of the Munsif of Cawnpore. The defendant company filed a written statement

* Second Appeal No. 766 of 1920, from a decree of Raj Behari Lal, Judge of the Court of Small Causes, exercising the powers of a Subordinate Judge of Cawnpore, dated the 28th of April, 1920, confirming a decree of Alakh Murari, Munsif of Cawnpore, dated the 11th of February, 1920.

(1) (1906) I. L. R., 28 All., 552

(2) (1911) I. L. R., 33 All., 544

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on the 15th of January, 1920, in which it was stated that the suit was time-barred. On the date of hearing, the 11th of February, 1920, the attorney of the defendant company put in an objection that no notice of a claim for compensation had been served within six months of the date of delivery for carriage. Upon this objection the Munsif dismissed the suit. The dismissal was upheld by the Subordinate Judge. The plaintiff company has come up in second appeal here.

The position taken by the plaintiff company appellant upon this point is as follows. In the first place, it is alleged that the Agent of the Great Indian Peninsula Railway Company had appointed a Deputy Traffic Manager to consider all claims under Rs. 1,000; that, in these circumstances, notice had been duly served as required by section 77 of Act IX of 1890 upon the Railway Administration through this Deputy Traffic Manager, and, further, that the plaintiff company had been prevented from making a claim of any kind for compensation for loss within six months of the date of delivery for carriage, inasmuch as the railway authorities had refused to give them definite information as to whether there had or had not been a loss until more than six months had expired from the date of delivery for carriage. A third point was also raised, that, as a matter of fact, the Agent had received notice of the plaintiff company's grievance within less than six months from the date of delivery for carriage, through the Deputy Traffic Manager whom he himself had appointed.

When we examined the appeal on the merits we found that there was practically no material upon which to decide these three points. The plaintiff company had not produced more than a very small portion of the correspondence. The defendant Railway Company had produced no evidence at all. Ordinarily the plaintiff company should have been made to suffer for this omission, but on the merits of the case, their omission to produce full evidence is excusable. As had already been noted, the defendant Railway Company did not raise the plea that the suit was bad in the absence of notice until the very day of hearing. The plaintiff company urges that if that plea had not been raised, it would hardly have been necessary to produce the correspondence or the rules under which the Deputy Traffic Manager was appointed to receive these claims. There is weight in that argument. It is absolutely necessary that we should have before us the correspondence and the rule, and we, therefore, pass the following

order under order XLI, rule 27. The plaintiff appellant shall be permitted to produce the following additional evidence :—

(1) All letters received from the defendant company not already filed

(2) Proved copies of all letters sent by them to the defendant company, if the originals are not produced by the defendant company after notice. The defendant company will be at liberty to produce—

(1) all correspondence received by them from the plaintiff company,

(2) proved copies of all letters sent by them to the plaintiff company, if the originals are not produced by the plaintiff company after notice.

It will also be open to the plaintiff company to produce evidence as to the rules by which the Deputy Traffic Manager is authorized to receive all claims on behalf of the company and as to communication of their complaint by the Deputy Traffic Manager to the Agent

We shall be ready to consider applications from either party for the production of further evidence relating to the question of notice.

The matter will be put up again before this Bench within a month for further orders

In accordance with this order, STUART, J., having meanwhile left the court on deputation, the appeal was laid before a Bench composed of LINDSAY and DANIELS, JJ.

Dr. *Kailas Nath Katju*, for the appellant

Pandit *Ladli Prasad Zutshi*, for the respondent

LINDSAY and DANIELS, JJ. :—This case had been before a Bench of this Court previously and the facts are all set out in an order of the 21st of March last. By the order which was passed on that date it was directed that certain further evidence should be produced before this Court in order to enable us to deal with the particular question which was raised. Both parties have filed documentary evidence and the case has now been argued before us.

It is not necessary to re-state the facts, which are all set out in the order of the Bench of the 21st of March last. The suit was a suit brought by the Cawnpore Cotton Mills, Limited, against the Great Indian Peninsula Railway. That suit has failed in both the courts below on the ground that no notice as required by section 77 of the Railways Act (Act No. IX of 1890) was served upon the defendant company, and the only

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question which is now before us is whether both the courts below were right in so holding or whether from the evidence before us it can be taken that there was due and proper service of the notice required by section 77 upon the defendant Railway Administration.

We have been referred to a number of cases which have been decided by the various High Courts, and Dr. *Katju*, who has argued the case very ably on behalf of the appellant, has laid particular stress upon a ruling of the Madras High Court in the case of *A. Venkata Iyyar* v. *South Indian Railway Company* (1).

It has been suggested here at one stage of the argument that as a matter of law no notice was necessary in this case. We need not refer to this contention any further than to say that the plea on which it is based was not raised in any of the courts below, and having regard to the terms of the plaint, it does not seem to us to be possible for the learned counsel for the appellant to withdraw his case from the purview of section 77. It is clear, therefore, that in order to enable a suit for this claim to be maintained, the notice which was required by section 77 was necessary.

We next come to the provisions of section 140 of the Railways Act which lays down the manner in which notices or documents required to be served on the Railway Administration may be served. Some argument was addressed to us as to the proper interpretation of the word "may" in this section. There is some authority in support of the argument that the word "may" must not here be read as "must", to be found in the judgment of one of the learned Judges composing the Full Bench which dealt with the case to which we have already referred. So far as this Court is concerned, we are bound by the decisions in *Great Indian Peninsula Railway Company* v. *Chandra Bai* (2) and *Great Indian Peninsula Railway Company* v. *Ganpat Rai* (3). In both these cases it was held, and we agree, that the language of section 140 is imperative and that the word "may" must be read as "must." What the section lays down is that where any notice or document has to be served on a Railway Administration, such service may be had in one or other of three ways. The meaning of the section clearly is that service must

1) (1921) I. L. R., 45 Mad., 135.
2) (1906) I. L. R., 28 All., 552.
3) (1911) I. L. R., 33 All., 644.

be made in one or other of the ways referred to in clauses (*a*), (*b*) and (*c*) of the section

In the present case, therefore, we have to consider whether the notice of suit in this case was served in one or other of these ways. It is not contended that there was any service of notice in the manner prescribed either by clause (*b*) or clause (*c*) of the section; it remains to be determined whether there was a service under clause (*a*), that is to say, by delivering of the notice to the Manager or Agent.

We have been referred to the correspondence which passed between the parties with relation to this claim and the first thing that emerges from a perusal of these documents is that no direct communication was made by the plaintiff to the Agent of the Great Indian Peninsula Railway before the 5th of August, 1919.

It may be mentioned that this notice which was sent on the date just mentioned was sent after the expiry of six months from the date on which the goods were delivered to the railway for carriage (the 26th of November, 1918).

It has, however been argued before us that the correspondence which has been now filed in this case and the evidence of the Agent which was taken upon commission in the shape of interrogatories show, that the authority to deal with claims against the Railway Company had, in certain instances, been delegated to another official who is described in the correspondence as the Deputy Traffic Manager "Commercial."

It is no doubt proved that notice of the claim of the plaintiff company was given to this official, for there are on record copies of correspondence which passed between him and the company. It is argued, therefore, that inasmuch as this official had notice of the claim which the plaintiff company intended to bring, that notice was good notice upon the Agent inasmuch as the Deputy Traffic Manager "Commercial" had been appointed by the Agent of the Railway for the purpose of disposing of these claims.

It is one thing to say that this subordinate official had been entrusted with authority by the Agent to dispose of claims brought against the company and another thing to say that there was delegated to him the power to receive a notice of suit such as is required by section 77 of the Indian Railways

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Act. The two cases are not obviously the same, and we, therefore, hold that no notice given to the Deputy Traffic Manager "Commercial" of the Great Indian Peninsula Railway, Bombay, was good and sufficient notice within the meaning of the Act.

Dr. Katju has referred to the printed post-card which was received by the plaintiff company in response to the notice given on the 5th of August, 1919. In this notice it is, indeed, stated that the claim had been referred to the General Traffic Manager who had full powers to deal with such matters on behalf of the company, and by this post-card the plaintiff company was invited to send any further communications on the subject of their claim to the General Traffic Manager. We do not think the terms of this document advance the plaintiff's case any further. All that is stated is that the General Traffic Manager has authority to deal with the claims. That, in our opinion, does not indicate that the General Traffic Manager or any one who was subordinate to him in the office had authority to receive the statutory notice which the Act prescribes.

We think, therefore, that the decision of the court below on the legal point is a correct one. We are, however, entitled to say that this is a case of distinct hardship and is a case which unfortunately arises on many occasions. There can be no doubt that many, if not all, of the Railway Administrations in India have given the public to understand that claims in respect of losses incurred on the railways are to be dealt with by one or other subordinate officer of the administration, and, no doubt, many people are misled by notices of this kind and fail to consider that in order to maintain a suit against the Railway Administration it is imperative that a *notice* under section 77 should be served upon the Railway Administration and served in one or other of the modes laid down in section 140. It is unfortunate that so many of these cases arise in the courts; but, as the law stands, we are unable to relieve plaintiffs who find themselves in this unfavourable position. The law is clear and if it has to be observed, the plaintiffs' suit must fail. We, therefore, hold that this appeal fails and we dismiss it accordingly with costs.

Appeal dismissed.

APPELLATE CIVIL.

Before Mr. Justice Lindsay and Mr. Justice Daniels.

1923 *January*, 30.

KESHO SARAN (DEFENDANT) v. KHAIRATI LAL (PLAINTIFF)*

Execution of decree—Money paid by one decree-holder to another as a condition precedent to the former being permitted to bid at a sale in execution of his own decree—Sale set aside—Suit to recover payment—Civil Procedure Code, section 102—Small Cause Court suit—Appeal.

K, holding a decree against A, sought to bring to sale certain immovable property supposed to belong to A KS, who also held decrees against A, applied for rateable distribution of the sale proceeds K then applied to the court for leave to bid for the attached property, and the court granted leave, but on the condition that he paid off the decrees held by KS This K did, and then purchased the property in question himself. The sale was, however, set aside at the instance of a person who established his own title to the property sold Thereupon K sued KS to recover the money which he had paid in satisfaction of the decrees held by the defendant

Held that the suit was one of the nature cognizable by a court of small causes and consequently, having regard to its valuation, no second appeal would lie.

THE facts of this case sufficiently appear from the judgment of the Court.

George Banerji (for Babu *Piari Lal Banerji*), for the appellant.

Munshi *Panna Lal* (for Dr. *Kailas Nath Katju*), for the respondent.

LINDSAY and DANIELS, JJ. :—A preliminary objection is raised to the entertainment of this appeal, based upon the provisions of section 102 of the Code of Civil Procedure; in other words, it is argued that the suit out of which the appeal has arisen was a suit of the nature cognizable by a Court of Small Causes, and as the subject-matter of the suit was under Rs 500, therefore no second appeal lies.

The facts are as follows :—

The plaintiff in the suit was one Khairati Lal. This man had a decree against one Abdul Aziz which he was executing by sale of certain immovable property supposed to belong to Abdul Aziz.

At the time when these execution proceedings were pending, it seems that the other party to this suit, namely, Lala Kesho Saran, held two decrees against the same judgment-debtor Abdul Aziz. Kesho had applied in the execution proceedings taken by Khairati Lal, for rateable distribution of assets.

* Second Appeal No. 589 of 1921, from a decree of Murari Lal, Additional Judge of Moradabad, dated the 2nd of February, 1921, confirming a decree of Kashi Nath, City Munsif of Moradabad, dated the 24th of August, 1920.

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When the time came for sale of the property, Khairati Lal, the decree-holder, applied to the court for permission to bid. The court gave him the permission on the condition that before bidding for the property he was to satisfy the two decrees which Kesho Saran held against the judgment-debtor Abdul Aziz. Khairati availed himself of this condition, paid the decretal money owing to Kesho Saran and, thereafter, bid for and purchased the property.

Afterwards there was a suit by a third party, one Muhammad Jan, to have the sale set aside on the ground that the property which was sold and purchased by Khairati Lal was not the property of Abdul Aziz at all but was Muhammad Jan's own property. This suit succeeded and the result, therefore, so far as Khairati Lal was concerned, was that he was deprived of his purchase. Khairati Lal then brought this suit to recover from Kesho Saran the money which he had paid in satisfaction of Kesho Saran's two decrees. The amount in suit was Rs. 198-15-8, and there was added a claim for Rs. 70 by way of interest, so that the total came to somewhere under Rs. 270.

It is clear, therefore, that having regard to the value of the subject-matter of the suit, no second appeal will lie unless it can be shown that the suit was exempted from the cognizance of the Small Cause Court.

Mr. Banerji, who has argued the case on behalf of the appellant, contends, in the first place, that the suit may be treated as a suit under clause (2) of the second schedule to the Provincial Small Cause Courts Act. That clause relates to suits concerning acts purporting to be done by any person in pursuance of a judgment or order of a court or of a judicial officer acting in the execution of his office. We cannot see that this clause has any application to the claim now before us for consideration. The clause clearly refers to suits for damages in respect of acts done under the orders of a court and it cannot be pretended that Khairati Lal paid over the money to Kesho Ram under any such order. The court merely gave him the option of paying the money as a condition of his being allowed to bid at the auction. Failing this clause, the learned counsel for the appellant would rely upon clause (26) of the second schedule which relates to suits to compel a refund of assets improperly distributed under section 73 of the Code of Civil Procedure. Here again we are unable to accept the argument, for it appears to us to be perfectly clear that the suit was not a suit of the kind described in this clause. It follows, therefore,

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that the learned counsel not being able to bring his suit under any of the heads referred to in the second schedule to the Provincial Small Cause Courts Act, it must be taken that the suit was of a nature cognizable by a Court of Small Causes and, consequently, under section 102 of the Code of Civil Procedure no appeal lies. We allow the preliminary objection and dismiss the appeal with costs to the respondent.

Appeal dismissed.

Before Mr Justice Lindsay and Mr Justice Daniels.

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January, 31

KAMTA PRASAD (DEFENDANT) v. SHEO PRASAD (PLAINTIFF) AND RAM CHARAN AND OTHERS (DEFENDANTS) *

Landlord and tenant—Rights of tenant as regards trees standing on his holding—Occupancy tenant

In the absence of a custom or contract to the contrary, an occupancy tenant has a right as against his zamindar to the fruit of trees standing upon his holding, though the trees themselves may be the property of the zamindar

Imdad Khatun v. *Bhagirath* (1) and *Ganga Dei* v. *Badami* (2), referred to.

THE facts of this case sufficiently appear from the judgment of the Court

Pandit *Mohan Lal Sandal*, for the appellant

Pandit *Braj Nath Vyas*, for the respondent.

LINDSAY and DANIELS, JJ. :—The plaintiff in this suit is an occupancy tenant and he brought a claim against his landlord to recover a certain sum of money by way of damages, alleging that the landlord had without any right deprived him, the plaintiff, of the fruits of certain trees which stand upon his occupancy holding.

The first court dismissed the claim but the lower appellate court has decreed it in part. It has given the plaintiff relief with respect to the compensation demanded on account of the taking away of mango fruits but has dismissed the claim as regards the fruits of the two other trees, namely, a *jamun* and a *lasora* tree.

The defendant zamindar has appealed and the plaintiff has filed cross-objections. The case came up before a Judge of this Court who has referred it for decision to a Bench, being of opinion that a question of general importance is raised.

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* Second Appeal No 944 of 1921, from a decree of Lakshmi Narain, Second Subordinate Judge of Cawnpore, dated the 31st of March, 1921, modifying a decree of Alakh Murari, Munsif of Cawnpore, dated the 15th of December, 1920.

(1) (1888) I. L. R., 10 All., 159

(2) (1908) I. L. R., 30 All., 134

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It seems to us that the law on the subject presents no difficulty whatever. There can be no doubt that the plaintiff (the tenant) has been in [illegible] of this land, which is, as we have said, his [illegible] holding. When land is let out to a tenant the [illegible] the tenant the right to occupy the land which [illegible] and to enjoy the fruits of the trees [illegible] thereon, and in the absence of any contract or custom to the [illegible] of the tenant to enjoy the occupation of the land and to enjoy the fruits of the trees.

The lower [illegible] court in dealing with this matter appear to have been under the [illegible] that it was necessary for the plaintiff [illegible] to make out some title by adverse [illegible] but [illegible] it is quite clear on general principles that the tenant had a right to enjoy the land and [illegible] which were on it. [illegible] to the [illegible] carried to [illegible] himself the right to [illegible] or [illegible] of contract was [illegible] proved.

As regards the law on the subject we need only refer to two rulings of this Court, one in *Inshad Khetan* v. *Bhagirath* (1) and the other in *Ganga Dei* v. *Badam and others* (2). In the first mentioned case it was held by the Bench that, on a review of all the authorities, the trees on an occupancy holding, whether planted by the tenant himself or not, belonged and attached to the occupancy holding. Again, in the latter case, it was laid down as follows :—

"The pre-sumption of law, and the general rule in the absence of custom, is that the property in timber on a tenant's holding vests in the zamindar, and that the tenant has no right to cut and remove such timber. But it appears to be clear that in the absence of a custom or of a contract to the contrary, a zamindar has no right to interfere with the enjoyment by his tenant of the trees upon his holding as long as the relation of landlord and tenant subsists."

The law as laid down in these cases clearly covers the case which is now before us. The defendant's appeal, therefore, fails and is dismissed with costs.

The plaintiff has filed cross-objections urging that the lower appellate court was wrong in dismissing the claim regarding the *jamun* and *lasora* trees. It is quite clear that there is no ground for drawing any distinction between the case of the mango tree and the case of these trees, and the consequence is

(1) (1888) I. L. R., 10 All., 159.
(2) (1908) I. L. R., 30 All., 134.

that the cross-objections must be allowed. The result of all this is that the decree of the court below is modified and we direct that the plaintiff's claim be decreed with costs in all courts.

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Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Daniels.

RAM BADAN SINGH *v.* JANKI AND OTHERS.*

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Criminal Procedure Code, sections 107 and 250—Security to keep the peace—Section 250 not applicable to proceedings under section 107.

Section 250 of the Code of Criminal Procedure does not apply to proceedings under section 107 of the Code *Rikhai Rai* v. *Sheopujan* (1) and *Bindhachal Prasad Rai* v *Lal Behari Rai* (2), followed

THIS was a reference from the Sessions Judge of Ghazipur.

The facts which gave rise to the reference are thus stated in the Sessions Judge's order :—

> "The applicant made an application that Janki Singh and others should be bound down to keep the peace under section 107 of the Code of Criminal Procedure His application was rejected and he was ordered to pay compensation under section 250 of the Code of Criminal Procedure for making a vexatious complaint. I agree with the lower court that there was no sufficient reason for binding over the persons against whom the complaint was made. That part of the order should not be interfered with. It has, however, been repeatedly held that section 250 does not apply to complaints under section 107 of the Code of Criminal Procedure, because there is no accusation of the commission of an offence. The case is, therefore, referred to the Hon'ble High Court with a recommendation that the order for compensation should be set aside. I may refer to the cases of *Rikhai Rai* v. *Sheopujan Singh* (1) and *Bindhachal Prasad Rai* v. *Lal Behari Rai* (2) ".

DANIELS, J :—This is a reference by the learned Sessions Judge of Ghazipur recommending the cancellation of an order of compensation passed under section 250 of the Code of Criminal Procedure by a first class Magistrate of Ghazipur. The

* Criminal Reference No 5 of 1923.

(1) (1910) 7 A. L. J., 743.

(2) (1914) I. L. R., 36 All., 382.

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order was passed in proceedings under section 107 of the Code of Criminal Procedure. Section 250, by its terms, applies only to a case where a person is accused before a Magistrate of an offence and not to proceedings the object of which is to require him to give security to keep the peace. This has been held in the cases referred to by the learned Sessions Judge. I, therefore, accept the reference and set aside the order of compensation. The amount, if paid, will be refunded.

Order set aside.

APPELLATE CIVIL.

Before Mr. Justice Walsh and Mr. Justice Ryves.

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RADHA MOHAN AND OTHERS (APPLICANTS) v. M. C. WHITE AND ANOTHER (OPPOSITE PARTIES).*

Act No. V of 1920 (Provincial Insolvency Act), section 66, sub-section (2)—Civil Procedure Code, section 60—Insolvent—Proportion of salary of insolvent divisible amongst creditors—Allowance for support of insolvent and his family.

The combined operation of section 28(5) of the Provincial Insolvency Act, 1920, and section 60(1) (m) of the Code of Civil Procedure in the case of an insolvent whose means consist of a salary, to make only half of his salary divisible amongst his creditors. But this does not mean that all of that half *must* be divided amongst the creditors. Section 66(2) of the Provincial Insolvency Act provides that the court may from time to time make such allowance as it may think just for the support of the insolvent and his family, and in fixing such allowance the court is not limited to the one half of the insolvent's salary which is exempted by section 60 of the Code of Civil Procedure. *Debi Prasad* v. *Lewis* (1) not followed.

THE facts of this case are fully set forth in the judgment of the Court.

Babu *Lalit Mohan Banerji*, for the appellants.

Mr. *E. A. Howard*, for the respondents.

WALSH and RYVES, *JJ.* :—This is an appeal by a body of creditors against an order of the District Judge of Allahabad making a personal allowance to the insolvent out of his property for the support of himself and his family, under section 66, sub-section 2, of the Provincial Insolvency Act No. V of 1920. One difficulty in delivering a clear judgment in a case of this kind is that the enumeration of the appropriate sections has been altered from time to time by various Amending Acts. We will confine our observations to the sections of the present Act. Leave was required under the Act, as the counsel for the insolvent rightly objected, and was not applied for until a late stage of the proceedings, and the matter of leave was referred

* First Appeal No. 130 of 1922, from an order of R. L. Yorke, District Judge of Allahabad, dated the 21st of April, 1922.

(1) (1916) I. L. R., 40 All., 213.

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to the court hearing the appeal. As the case has been argued as one of principle, and appears to us to require careful consideration in view of certain existing decisions, we have granted the necessary leave, it being clearly a case in which it would have been granted if applied for at once by any court appreciating the point involved.

The insolvent is an engine driver on the East Indian Railway in receipt of a fixed salary of about Rs. 250 with various monthly allowances and accretions, due to over-time and other matters, which increase his monthly salary sometimes to nearly Rs. 500 and roughly to an average exceeding Rs. 400. The factors which must be taken into account in reducing this gross sum in order to arrive at the actual net income really enjoyed by the insolvent are not very clearly before us and, in the view which we take, do not become important. But these two facts may be stated as representing, at any rate, the minimum of what is shown, namely, that half his gross salary would be at least Rs. 200 and that the sum directed by the District Judge to be paid to the creditors, namely, Rs 120, is certainly less than any just estimate of the actual half of the net income actually enjoyed by this engine driver. As will appear, when we come to consider the relevant sections, the expression, "directed to be paid to the creditors", is not really an accurate method of expressing it. A more accurate method is that the learned Judge has granted an allowance, out of the property *primâ facie* divisible amongst the creditors, amounting to such a sum as when deducted from his half salary leaves a balance of Rs. 120 divisible amongst the creditors.

There is no doubt that in the case of a person in India in receipt of a salary or pension, the maximum which is divisible amongst the creditors is half. That maximum is fixed by statute. Section 28, the ordinary vesting section, makes the whole of the property of the insolvent, on adjudication, divisible amongst the creditors, but excepts, by sub-section 5, from the property so divisible, any property which is exempted by the Code of Civil Procedure from attachment. Section 60 of the Code of Civil Procedure, in the case of this engine driver, exempts half his salary from attachment. The combined operation, therefore, of section 28 (5) of the Provincial Insolvency Act and section 60 (*i*)(iii) is to make only half his salary divisible amongst the creditors. The creditors in this appeal contend that that amount is not only the maximum but the minimum; in other words, that the personal allowance which

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section 60 of the Code of Civil Procedure leaves to the enjoyment of the ordinary debtor by exempting it from attachment, is the only sum which a court in insolvency can allow an insolvent under its jurisdiction to enjoy for the support of himself and his family. So stated, the contention sounds reasonable. But the difficulty of accepting it is this. Section 66, sub-section (2), of the Provincial Insolvency Act provides that the court may from time to time "make such allowance as it may think just to the insolvent out of his property for the support of himself and his family, and such allowance may, at any time, be varied or determined by the court." If both the maximum and the minimum are fixed by statute, this provision is nugatory and might as well be struck out of the Act in every case in which a man is earning his income by salary to which section 60 of the Code is applicable. Indeed the contention is that this sub-section of the Insolvency Act is unworkable in the case of a person paid by salary, and therefore, cannot be held to apply to him at all. But if it was intended to fetter the discretion of the insolvency court in the case of a man who is earning his money by salary, and his half salary was already protected by the operation of section 60 of the Code of Civil Procedure, the Legislature ought to have said so. The argument really invites us to legislate, rather than to interpret. The language of the sub-section itself, namely, the use of the word "property" without qualification, clearly includes that part of his property, or, in other words, his half salary, which by the joint operation of the two sections already referred to becomes divisible amongst the creditors under section 28 of the Insolvency Act. Three cases have been cited to us which seem to support the contention of the creditors, although they may, if one were disposed to enlarge upon fine distinctions, be said to be not strictly in point. But in substance it does appear to have been decided that the amount which an insolvent may be allowed for maintenance is irrevocably fixed by section 60 of the Code of Civil Procedure. We are not satisfied that either of the courts in the cases cited really intended to go to that length, although they used language which appears to produce that result. If they meant that the amount fixed by section 60 of the Code of Civil Procedure so fettered the discretion of the learned Judge that he could not depart from it, we find ourselves unable to agree with that view, because we think that it is equivalent to a refusal to apply the express language of section 66, sub-section (2). But

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really the argument pushed to its logical conclusion must come to this that, inasmuch as section 60 fixes the sum both as regards maximum and minimum in all cases of salary, the Court of Insolvency has no jurisdiction under section 66, sub-section (2) to touch the matter. In other words, section 60 has removed it from the Insolvency Court's cognizance, and that any attempt by the Insolvency Court to alter it by one pice would be *ultra vires*. That is the contention of Mr. *L. M. Banerji*, who is always logical, in pressing the view of the appellants, and that is the inevitable result of the argument, but we are not satisfied that the Courts in the cases relied upon intended to go to that length.

It is only necessary to refer to the decision of our brother RAFIQ in a revision case reported in *Debi Prasad* v *J. A. H. Lewis* (1). In that decision he followed and adopted the view taken in the two previous cases mentioned by him in his judgment, holding that section 60 of the Code of Civil Procedure had fixed the proportion immutably at half, and he did not consider what, under these circumstances, was the meaning which ought to be given by an Insolvency Court to section 66, sub-section (2). We hold that the law in India is precisely the same as in England on this matter. Indeed historically it is correct to say that the sub-section in question, namely, section 66 (2), is taken direct from the English legislation on the subject, and that the Insolvency Courts in this country, in spite of the fact that they cannot attach the half salary which is removed from the grasp of the creditors by section 60, have an absolute discretion to make a further reasonable allowance, appropriate to the condition and the circumstances of the insolvent, out of the remaining half which is otherwise divisible amongst the creditors, and that, on this ground, the appeal fails.

We think it right to add that we entirely approve of the thoroughness and of the methods and considerations applied to the decision of the question, and of the result arrived at, by the learned Judge in this case. In any event he is the best, and indeed almost the only Judge, provided he has all the materials before him. His notes and his order alike show that he examined into the position very closely. He found, as is the case, that if the insolvent keeps up the payment, which he has hitherto done regularly, of Rs. 120 per month, all the creditors will receive payment in full within a period very little

(1) (1918) I. L. R., 40 All., 213.

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more than two years from the order of adjudication. If this happens, they will have done extremely well. It is very rare that in an insolvency creditors ever get paid in full at all, and it is largely due to the salutary provision by which salary can be attached and deducted in this country, that in this particular case the creditors have a reasonable hope of being paid in full. It is not suggested that the insolvency has been brought on by any misconduct, or reckless conduct in the insolvency sense of these words, on the part of this engine driver. It looks as if he had fallen into the somewhat easy habit of living towards extravagance in the ordinary affairs of life, such as dress and necessaries. Mere it is true there is one large claim by a money lender, as the result of the conduct of the creditors themselves. Trade people who, either in the stress of business, or out of kindness of heart, encourage persons in a humble condition of life to go on running on credit in a way which they must know is beyond their means, have only themselves to thank if, in the end, they lose their money altogether, and if they are merely delayed in payment, as these creditors seem likely to be, they suffer no loss, because the ordinary risks of trade which occur through bad debts and unwilling payers fall, as a rule, as every body knows, upon the honest customers who pay promptly, and whose charges must include the loss of the tradesman who would otherwise have to shut up shop. Nobody wishes to discourage a tradesman from giving credit, or such credit as he is satisfied the customer can stand, but a tradesman who continues to supply goods after it is obvious that the customer is unable to pay or unwilling to pay for the arrears which are due, brings upon himself such loss as he may suffer, and in our view a Judge, sitting in insolvency, has to consider these matters, that is to say, the conduct of the creditors, as well as the conduct of the debtor, in the general public interest, to serve which the bankruptcy law has been devised. On the whole we think the order complained of in this case was really generous to the creditors. At any rate there is nothing to complain about in it, and the appeal must be dismissed with costs.

Appeal dismissed.

FULL BENCH.

Before Mr. Justice Lindsay, Mr Justice Ryves and Mr. Justice Daniels. 1923

BINDESHRI PRASAD TIWARI (APPLICANT) v. BADAL SINGH AND OTHERS (OPPOSITE PARTIES).* *February*, 2.

Civil Procedure Code, section 47—Execution of decree—Sale in execution of decree confirmed, but decree subsequently set aside in separate suit—Right of auction purchaser to recover price paid—Procedure.

Held that an auction-purchaser under a decree which has been, after confirmation of the sale, set aside as the result of a separate suit, can recover his purchase-money from the decree-holder *Ram Sarup* v. *Daipat Rai* (1), distinguished *Rewa Mahton* v. *Ram Kishen* (2), *Dorab Ally Khan* v. *Abdool Azeez* (3) and *Rodger* v *Compton D'Escompte de Paris* (4), referred to

Held further that in the above circumstances the remedy of the auction-purchaser may be by application under section 47 of the Code of Civil Procedure. *Tanjatur Subbarayudu* v. *Yerram Setti Seshasam* (5), *Veyndramuthu Pillai* v. *Maya Nadan* (6), *Prosunno Kumar Sanyal* v. *Kali Das Sanyal* (7), *Narambhat bin Chintamanbhat* v. *Bando Krishna Kulkarni* (8) and *Sita Ram* v *Janki Ram* (9), referred to.

THE facts of this case were as follows :—

Badal Singh and others held a mortgage executed by Debi Saran Dhar Debi Saran Dhar formed a joint family with his minor grandson Ram Bujharat. The mortgagees brought a suit on the basis of their mortgage in the year 1917, impleading Debi Saran Dhar and Ram Bujharat In this suit they obtained a preliminary decree for sale on the 1st of June, 1917. The decree was made final on the 22nd of January, 1918. On the 22nd of April, 1919, the mortgaged property was put up to sale and was purchased for Rs. 660 by Bindeshri Prasad, who was a stranger to the suit. The sale was confirmed under order XXI, rule 92, of the Code of Civil Procedure on the 24th of May, 1919.

After this Ram Bujharat, who had been represented in the mortgage suit by his grandfather as his guardian *ad litem*, brought a suit, under the guardianship of another person, against the decree-holders and the auction-purchaser, for a declaration that neither the mortgage nor the decree for sale nor

* Second Appeal No 580 of 1922, from a decree of Lakshmi Narain Tandon, Subordinate Judge of Basti, dated the 9th of January, 1922, confirming a decree of Lakshmi Datt Joshi, Munsif of Bansi, dated the 28th of February, 1921

(1) (1920) I L R., 43 All., 60
(2) (1886) L R., 13 I. A., 106.
(3) (1878) L. R., 5 I A., 116
(4) (1871) L. R., 3 P C., 465
(5) (1916) I L R., 40 Mad., 299
(6) (1919) I. L R., 43 Mad., 107.
(7) (1922) I L R., 19 Calc., 663
(8) (1918) I L. R., 42 Bom., 411.
(9) (1924) I. L. R., 44 All., 200.

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the question sale held the remainder were binding upon him. The suit was decreed in his favour on the 14th of August, 1919, in respect of all the three declarations asked for. On the strength of this decree Ram Bujharat obtained Bindeshri Prasad from possession of the property purchased by him. On an application under section 144 of the Code of Civil Procedure in the original mortgage suit possession was restored to him on the 24th of August, 1920. Bindeshri Prasad then applied under section 47 of the Code of Civil Procedure for the refund of the price which he had paid for the property at the auction sale. The court of first instance dismissed the application, and an appeal against this order was likewise dismissed, the lower appellate court also holding that a separate suit to recover the amount paid was entertainable.

Bindeshri Prasad appealed to the High Court.

Dr. *Kailas Nath Katju* and Pandit *Narmadeshwar Prasad Upadhiya*, for the appellant.

Maulvi *Muhammad Abdul Aziz* (for Dr. *S. M. Sulaiman*), for the respondents.

GIDNEY, RYVES and PANDEY, JJ.:—The main question for decision in this appeal is whether an auction purchaser under a decree which has been, after confirmation of the sale, set aside as the result of a separate suit, can recover his purchase-money from the decree holder. If the answer is in the affirmative, as we think it must be, there is a subsidiary question as to whether his remedy is by application under section 47 or 144 of the Code of Civil Procedure or by a separate suit.

The appellant Bindeshri Prasad is the auction purchaser. The decree under which the sale was held was a decree for sale on the basis of a mortgage executed in favour of the respondents by one Debi Saran Dhar. Debi Saran Dhar formed a joint family with his minor grandson Ram Bujharat. The respondents brought a suit for sale on the basis of their mortgage in the year 1917 impleading Debi Saran Dhar and Ram Bujharat. In this suit they obtained a preliminary decree for sale on the 1st of June, 1917. The decree was made final on the 22nd of January, 1918. The property was put up for sale on the 22nd of April, 1919, and purchased by the appellant for Rs. 660. The appellant was a stranger to the suit. The sale was confirmed under order XXI, rule 92, on the 24th of May, 1919.

Unfortunately for themselves the respondents made Debi Saran Dhar guardian *ad litem* of his grandson, thereby debarring the latter from pleading that the mortgage was not for

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legal necessity. The result was that Ram Bujharat, through another person as next friend, afterwards brought a suit against the respondents decree-holders and the auction-purchaser for a declaration that neither the mortgage, nor the sale decree, nor the auction sale held thereunder were binding on him. The suit was decreed in his favour on the 14th of August, 1919, in respect of all the three declarations asked for. Armed with this decree Ram Bujharat was successful in ousting the appellant from possession of the property. On an application under section 144 of the Code of Civil Procedure in the original mortgage suit possession was restored to him on the 24th of August, 1920. The auction-purchaser then made the present application for refund of the price which he had paid. It was filed as an application under section 47 of the Code of Civil Procedure in the original mortgage suit brought by the respondents, but the applicant subsequently asked that if the application was held not to come under section 47, it should be treated as a separate suit under the provisions of sub-section (2) of that section.

The courts below dismissed the application. Both courts have held that section 47 is inapplicable, and the lower appellate court has held on the authority of *Ram Sarup* v. *Dalpat Rai* (1) that no separate suit to recover the amount could be entertained. We think that the ruling in question is clearly distinguishable. That was a case in which property was sold in execution of a simple money decree A third party subsequently came forward and claimed that the property which had been sold belonged to him and not to the judgment-debtor His suit was decreed and the auction-purchaser was deprived of the property The ruling relies on the principles that there is no warranty of title at an auction sale, and that what was sold was merely the right, title and interest of the judgment-debtor and that the purchaser took the risk that the judgment-debtor's title might turn out to be defective. No question was ever raised, or could be raised, as to the validity of the decree under which the sale was held. Here the facts are altogether different. Ram Bujharat claimed and obtained a declaration that not merely the sale but the decree and the mortgage on which it was based were void and of no effect as against him. The decree-holders have, therefore, obtained from the auction-purchaser, under an invalid decree, money to which they have no right, and there is a clear equity in favour

(1) (1920) I. L. R., 43 All., 60.

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of the purchaser entitling him to recover it back. It is a well-established principle that the auction-purchaser is not bound to look beyond the decree. If a decree is in existence he is entitled to assume that it is a valid decree. This was laid down by the Privy Council in 1886 in *Rewa Mahton* v. *Ram Kishen* (1). If the law were otherwise, a purchase at an execution sale would be reduced to the merest gamble. A distinction between a defect in the judgment-debtor's title to the property sold, and the case where there was no jurisdiction to sell the property, is recognized in the well-known case of *Dondi Khan* v. *Vishnu* (2).

In a recent case in which a sale was set aside by a separate suit and the judgment-debtors were restored to possession of the property, their Lordships of the Privy Council held that the auction-purchasers were entitled to recover from the judgment-debtors the purchase money which had been paid in satisfaction of debts of the latter. They quoted with approval the judgment of Cairns, L. C., in *Rodger* v. *Comptoir D'Escompte de Paris* (3), that one of the first and highest duties of all courts is to take care that the act of the court does no injury to any of the suitors, and they pointed out that the auction-purchasers had parted with their purchase-money and paid it into court on the faith of the order of confirmation and certificate of sale, and were entitled to be repaid.

It has been argued for the respondents that the decree was not wholly set aside but was only set aside in so far as it affected Ram Bujharat. The result was substantially to set aside the decree altogether. The decree was for sale of joint family property on a mortgage executed by the manager. It being found that the manager had no right to encumber the property, the decree for sale fell wholly to the ground, and the successful plaintiff was entitled to recover and did in fact recover the entire property. This argument, therefore, is of no avail to the respondents. The latter have obtained money to which they were not entitled, under a decree and sale which were invalid, and they are bound in equity to restore it to the appellant.

The question whether the application comes under section 47 or 144 of the Code of Civil Procedure is one of some difficulty. The words "varied or reversed" used in section 144 seem more applicable to a proceeding by way of appeal, revision or review than to a separate suit declaring that a decree is not

(1) (1886) L. R., 13 I. A., 166.
(2) (1878) L. R., 5 I. A., 116.
(3) (1871) L. R., 3 P. C., 466, (475).

binding on a particular party. The Madras High Court has, however, held in *Tangatur Subbarayudu* v. *Yerram Setti Seshasani* (1), that the section is applicable where a decree is set aside as the result of a subsequent proceeding. If the auction-purchaser can be regarded as the representative of the judgment-debtor, whose interest he purported to acquire, the question is *primâ facie* one coming under section 47. It is a question relating to the satisfaction of a decree, for it alleges that money has been wrongfully applied in satisfaction of the decree There is the authority of the Full Bench of the Madras High Court in *Veyindramuthu Pillai* v. *Maya Nadan* (2) for the view that a stranger purchaser at court auction is entitled and bound to have any question relating to the satisfaction of the decree decided under section 47. The learned Judges refer to and follow the decision of the Privy Council in *Prosunno Kumar Sanyal* v *Kali Das Sanyal* (3), which laid down that the courts in India were right in not placing a narrow construction on the language of section 244 (now section 47) of the Code of Civil Procedure, and that the fact that a purchaser was interested in the question in dispute had never been held to be a bar to the application of the section. In the Bombay High Court a contrary view has been taken, *Narsinbhat bin Chintamanbhat* v. *Bando Krishna Kulkarni* (4), but it was admitted that the Bombay view was contrary to the decisions of both the Allahabad and Calcutta High Courts. In a recent Full Bench of this Court in *Sita Ram* v. *Janki Ram* (5), it was suggested, if not definitely held, that even a question between a judgment-debtor and an auction-purchaser, who had failed to deposit the 25 per cent. of the purchase money required by order XXI, rule 84, came within the provisions of section 47. We think, therefore, that we are entitled to treat this application as coming within the provisions of that section. Even if we were not so satisfied, we should have been prepared to grant the relief asked for, on the analogy of section 144, in exercise of our inherent power under section 151 of the Code There is admittedly no question outstanding between the parties except that which has been decided in this appeal, and to require the question to be now tried out in a regular suit would be merely to put the parties to unnecessary expense

(1) (1916) I. L. R., 40 Mad., 299
(2) (1919) I. L. R., 43 Mad., 107.
(3) (1892) I. L. R., 19 Calc., 683.
(4) (1918) I. L. R., 42 Bom., 411
(5) (1922) I. L. R., 44 All., 284.

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For the reasons already given we allow the appeal and give the appellant a decree for the amount claimed against the respondents decree-holders, with costs in all courts.

Appeal allowed.

APPELLATE CIVIL.

Before Mr. Justice Ryves and Mr. Justice Daniels.

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February, 5.

RAM DAS (PLAINTIFF) v. INAYAT ULLAH AND ANOTHER (DEFENDANTS) *

Act No. II of 1899 (Indian Stamp Act), section 35(1); schedule I, article 1—Document requiring to be stamped ... of account between creditor and debtor kept for the purpose of affording evidence of the indebtedness of the latter.

The plaintiff sought to prove a debt due to him by the defendants by production of a statement of account recorded in the form of a letter in a book kept by him and signed by one of the defendants. The book appeared to be maintained by the plaintiff for the purpose of supplying evidence of the state of account between himself and his customers.

Held the entry or letter could not be put in evidence unless it was stamped. *Gulstaun* v. *Hutchison* (1), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. *Kailas Nath Katju*, for the appellant.

Maulvi *Mukhtar Ahmad* (for Munshi *Gulzari Lal*) for the respondents.

RYVES and DANIELS, JJ. :—This is an appeal by the plaintiff who sought to recover a sum of money from the defendants, one item of which was Rs. 660. This was claimed on a memorandum of accounts signed by one of the defendants, on the 27th of November, 1917, admitting that a sum of Rs. 660 was due by him to the plaintiff. This account, it appears, started in 1915. The suit was brought on the 14th of April, 1920, so that, unless the memorandum of the 27th of November, 1917, was legally admissible as an acknowledgment within section 19 of the Indian Limitation Act, so much of the claim as referred to this account would be time-barred. Both the lower courts have held that this document came within the definition of an acknowledgment of a debt in article 1 of the

* Second Appeal No. 1644 of 1921, from a decree of E. R. Neave, District Judge of Meerut, dated the 23rd of July, 1921, confirming a decree of Har Govind Bajpai, Subordinate Judge of Muzaffarnagar, dated the 4th of September, 1920

(1) (1912) I. L. R., 39 Calc., 769.

first schedule to the Indian Stamp Act and held that inasmuch as it did not bear a one anna stamp, under section 35 of that Act, it was inadmissible. Both courts, therefore, dismissed the suit so far as this claim was concerned. On appeal before us it has been urged—

(1) that the document did not require a stamp,

(2) that the suit was not based on this acknowledgment, and

(3) that, properly considered, this really was a suit for an account stated, within the meaning of article 64 of the first schedule of the Indian Limitation Act.

The document in question is in the form of a letter on a printed form in a book kept by the plaintiff. A carbon copy is taken from it and presumably was given to the defendants. It is addressed to the defendants, and after mentioning certain credits and debits, concludes with the statement that a sum of Rs. 660 is due to the plaintiff from the defendant, errors and omissions excepted, or rather the Hindi equivalent for this. This is signed by one of the defendants. It seems to us impossible to hold that this is not precisely within the meaning of article 1 of the first schedule to the Stamp Act. The way in which the book is kept and signed seems to us to prove that the acknowledgment was made in order to supply evidence of the debt. Various rulings have been quoted by the learned advocate for the appellant, and, among others, *Galstaun* v. *Hutchison* (1). That case, after all, merely lays down that each document has to be looked at by itself and it is for the court in each case to decide whether or not it falls within the definition of article 1 of the schedule to the Stamp Act. Accepting that criterion, we have no hesitation in saying that in this case, in our opinion, the document required a one anna stamp. That being so, it seems to us that under section 35 it cannot be used for any purpose at all. This really does away with both the other contentions raised by the appellant. In our opinion the appeal fails and is dismissed with costs.

Appeal dismissed

(1) (1912) I. L. R., 39 Calc., 789

Before Mr. Justice Ryves and Mr. Justice Daniels.

1923 February, 6. MUHAMMAD UMAR KHAN (PLAINTIFF) v. UMMATUL RAHIM BIBI (DEFENDANT).*

Civil Procedure Code, order II, rule 2—Suit by heir to recover property sold by deceased after setting aside sale-deed—Suit for possession of property not previously alienated—Different causes of action.

Plaintiff, alleging that he was heir to the extent of one third to one AA deceased, sued first in respect of certain specific property, which had been alienated by AA in his life-time, to have the sale set aside and to recover the property sold, in virtue of his title as heir, and, two months, for partition or joint possession of other properties of the deceased which had not been alienated by him.

Held that the cause of action for the latter suit was not the same as the cause of action for the former and that order II, rule 2, of the Code of Civil Procedure was not a bar. *Murti* v. *Bhola Ram* (1) and *Sona* v. *Bahinibai* (2), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Maulvi *Iqbal Ahmad*, for the appellant.

Maulvi *Muhammad Abdul Aziz* (for Dr. *S. M. Sulaiman*), for the respondent.

RYVES and DANIELS, JJ.:—These appeals arise out of three connected suits filed by the plaintiff appellant, Muhammad Umar Khan, for his share as heir, to the extent of one-third, of Ahmad Ali Khan deceased. In two of the suits he claims partition by metes and bounds of different properties, together with certain rents alleged to have been wrongly realized by the defendants. In the third suit he claims joint possession of the fractional share to which he is entitled. The suits were disposed of by the court below in one judgment and were dismissed on the ground that they were barred by order II, rule 2, of the Code of Civil Procedure by reason of a suit previously filed by the plaintiff against Musammat Ummatul Rahim and Musammat Mariam Bibi, defendants in these suits, and one Musammat Rukaiya Begam who is not a party to this litigation. The learned Munsif held that order II, rule 2, had no application to the facts of the case. The learned Subordinate Judge in a very brief judgment overruled him and dismissed the suits.

In view of this conflict of opinion it is important to see what precisely the nature of the previous suit was. That suit was concerned with certain property which Ahmad Ali Khan had sold in his life-time to Musammat Rukaiya Begam and Ummatul Rahim. The plaintiff's cause of action was, first,

* Second Appeal No. 1059 of 1921, from a decree of Partap Singh, Second Additional Subordinate Judge of Aligarh, dated the 26th of May, 1921, reversing a decree of Jiwan Chandra Malik, Munsif of Khurja, dated the 25th of November, 1920.

(1) (1893) I. L. R., 16 All., 165.
(2) (1916) I. L. R., 40 Bom., 351.

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MUHAMMAD UMAR KHAN v. UMMATUL RAHIM BIBI

that according to him the sale-deed was a fictitious transaction and without consideration, and second, that as heir to Ahmad Ali Khan he was entitled to a one-third share in the property of the latter.

So far as his claim to be heir of Ahmad Ali Khan is concerned, this portion of the cause of action is common to the previous suit and to the present suits. It is clear, however, that this allegation alone would not entitle the plaintiff to succeed in the previous suit. He was met by the plain fact that at the time of Ahmad Ali Khan's death the property did not stand in Ahmad Ali Khan's name. Ahmad Ali Khan had parted with it in his life-time by a registered sale-deed. Unless that sale-deed was set aside, it stood in the way of the plaintiff's claim and the plaintiff could claim no relief. It appears to us clear, therefore, that the learned Munsif was right in holding that order II, rule 2, does not apply. In the Full Bench case of *Murti* v. *Bhola Ram* (1) the plaintiff's cause of action is defined as consisting of every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgment of the court. The same criterion was adopted in the more recent Bombay case of *Sonu* v. *Bahinibai* (2), in which it was added that one test which is valuable in considering whether the causes of action are identical is whether the evidence which would suffice to enable the plaintiff to obtain a decree in both suits is the same. Judged by the criterion laid down in these two cases, it is clear that the causes of action in the previous suit and the present suits were not identical.

The learned counsel for the respondent has sought to support the decree of the court below as regards two of these suits on another ground, also based on order II, rule 2. He alleges that the plaintiff has wrongly filed three suits and that there was only one cause of action for all three of the present connected suits. This plea was never raised in the trial court, where the plaint in the first suit might, if necessary, have been amended, and we do not think that we should allow it to be raised now. For the reasons already given we allow the appeal, and as the cases were decided in the court below on a preliminary point, we remit the appeals to that court under order XLI, rule 23, for decision on the merits. The appellants will get their costs of these appeals in this Court.

Appeal allowed.

(1) (1893) I. L. R., 16 All., 165
(2) (1915) I. L. R., 40 Bom., 351

REVISIONAL CIVIL.

Before Mr. Justice Lindsay

1923
February, 5. MUNNI BABU AND ANOTHER (DEFENDANTS) v. KUNWAR KAMTA SINGH (PLAINTIFF) *

Act No. I of 1877 (*Specific Relief Act*), *sections* 19 *and* 20—*Suit for specific performance dismissed—Subsequent suit for recovery of earnest money*—*Civil Procedure Code, order II, rule* 2—*Cause of action*—*Act No. IX of* 1908 (*Indian Limitation Act*), *schedule I, article* 97—*Limitation*.

Held that the fact that a suit for specific performance of an agreement to sell has been dismissed is no bar to a subsequent suit for the recovery of earnest money paid in pursuance of such agreement. *Parangodan Nair* v. *Perumtaduka Illot Chata* (1), referred to.

Held also that as regards the second suit limitation did not begin to run until the first suit had been decided. *Udit Narain Misra* v. *Muhammad Manat-Ulla* (2), *Amma Bibi* v. *Udit Narain Misra* (3) and *Hanuman Kamat* v. *Hanuman Mandar* (4), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Narain Prasad Asthana*, for the applicants.

Mr. *C. Thompson* and Pandit *Uma Shankar Bajpai*, for the opposite party.

LINDSAY, J. :—This is an application for revision of a judgment of the Small Cause Court at Agra.

The suit was brought by the plaintiff for the purpose of recovering a sum of Rs. 200 which he had paid as earnest money in the following circumstances :—

On the 11th of October, 1915, the plaintiff had entered into a contract with the father of the defendants for the sale of certain property. Afterwards the plaintiff sued the father of the defendants for specific performance of the contract. That suit was dismissed finally by a judgment of this Court. The plaintiff now brings the present suit for recovery of the earnest money paid. The father having died in the meantime, the suit was brought against the sons.

Two pleas were raised in the court below in order to defeat the plaintiff's claim. It was argued, in the first place, that the suit was barred by the provisions of order II, rule 2, of the Code of Civil Procedure. The lower court overruled this plea and in my opinion rightly.

* Civil Revision No. 138 of 1922

(1) (1903) I. L. R., 27 Mad., 380.
(2) (1903) I. L. R., 25 All., 613.
(3) (1906) I. L. R., 31 All., 68
(4) (1891) I. L. R., 19 Calc., 123.

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The learned counsel for the applicant bases his claim upon the provisions of section 29 of the Specific Relief Act. The lower court in its judgment refers also to the language of section 19 of the same Act.

Section 19 enables a person who is claiming specific performance to ask, in addition, for compensation. Section 29 bars a subsequent suit for compensation after a suit for specific relief has been dismissed. Neither of these sections has anything to do with the present case, where the claim is for recovery of the earnest money. Order II, rule 2, has no application. The claim for the earnest money is based upon a different cause of action from that of the claim for specific relief. I may refer in this connection to the case of *Parangodan Nair* v. *Perumtoduka Illot Chata* (1).

The other plea raised was a plea of limitation. The defendants contended that article 62 was the proper article to apply, on the ground that the money advanced by way of earnest money should be deemed to be money had and received, and that the suit under this article was barred by limitation. The lower court rejected this plea and applied article 97 of the schedule to the Limitation Act, holding that the suit was one to recover money paid on an existing consideration which had afterwards failed. The lower court took the starting point of limitation to be the date of the judgment dismissing the plaintiff's suit for specific performance. Clearly this was a correct decision. The case is covered by authority: *Udit Narain Misra* v. *Muhammad Minnat-Ulla* (2). Another case which is in point is *Amma Bibi* v. *Udit Narain Misra* (3), a decision of their Lordships of the Privy Council, in which the judgment in the case of *Udit Narain Misra* v *Muhammad Minnat-Ulla* (2) was upheld.

The applicant has relied on *Hanuman Kamat* v. *Hanuman Mandur* (4). That was a case where one member of a joint family governed by Mithila law had executed a sale. It was there held that an agreement for sale by a member of a joint family was not void but voidable, and that the consideration only failed when the purchaser, being opposed, found himself unable to obtain possession. The failure of consideration did not take place when the money was paid, so as to

(1) (1903) I. L. R., 27 Mad., 380.
(2) (1903) I. L. R., 25 All., 618.
(3) (1908) I. L. R., 31 All., 68.
(4) (1891) I. L. R., 19 Calc., 123.

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bring the case under article 62 of the schedule to the Limitation Act. On page 126 of the report their Lordships say :—

"If there never was any consideration, then the price paid by the appellant was money had and received to appellant's use. But their Lordships think that the sale was not necessarily void but was voidable only if objection were taken to it by the other members of the joint family. If so, the consideration did not fail at once, but only from the time when the appellant endeavoured to obtain possession of the property, and, being opposed, found himself unable to obtain possession. There was then, at all events, a failure of consideration."

And, therefore, article 97 applied.

This is exactly the case here and I hold that the decision of the court below is correct. It has been represented to me that the lower court has given a personal decree against the defendants and it is said that in the circumstances, the father having died, no personal decree ought to be made against the sons. On the other hand, there is the consideration that, the father having died, the sons are under a pious obligation to discharge his debt. I do not think there is any ground for interference with the decision of the court below. The application is dismissed with costs.

Application dismissed.

1923

February, 5

Before Mr. Justice Lindsay.

SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT) v. JIWAN AND ABDULLAH (PLAINTIFFS).*

Railway company—Perishable goods consigned under risk-note form B destroyed owing to negligence of company's servants—Company not liable—"Loss"—Construction of document.

Held, on a construction of risk note form B, that the word "loss" as therein used does not mean loss to the owner of goods despatched, but loss of the goods by the railway company to whom they are delivered for carriage.

Hence, where goods of a perishable nature were delivered to a railway company for carriage under risk note form B, and by the negligence of the company's servants were so delayed in transit that they became worthless and had to be destroyed, it was *held* that the owner could not recover damages against the company. *Changa Mal* v. *Bengal and North Western Railway Company* (1), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Lalit Mohan Banerji*, for the applicant.

Mr. *Nihal Chand*, for the opposite party.

LINDSAY, J. :—This is an application for revision of a judgment of the Court of Small Causes at Saharanpur awarding the plaintiff firm damages against the Secretary of State as proprietor of the Oudh and Rohilkhand Railway.

The facts found by the court below are as follows :—On the 23rd of June, 1920, the plaintiff firm made over to the

* Civil Revision No. 133 of 1923.
(1) (1897) P. R., p. 23.

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railway 58 parcels containing mangoes. The goods were consigned to Lahore. At the time of sending the goods the plaintiffs executed a risk-note in form B.

The goods were delayed in transit and did not reach Lahore till the 4th of July, and, by that time, the fruit had become rotten. Delivery was offered to the consignee on the 5th of July but was refused by him and under the orders of the Station Superintendent the goods were then destroyed.

The Judge finds that the delay in the transit of the goods, and the resulting deterioration of the fruit, was due to gross negligence on the part of the railway's servants.

The present suit was brought by the plaintiff firm to recover the value or part of the value of the consignment. The railway company claimed the protection of the risk-note form B, pleading that as there was no loss of the goods by them, the plaintiffs could not recover.

The learned Judge overruled this plea, holding that the word "loss" in the risk-note was not equivalent to loss by the railway, that is to say, disappearance of the contents of the parcels, but meant the loss to the plaintiff firm occasioned by the destruction of the fruit while it was in the possession of the railway. The present application challenges the correctness of the lower court's interpretation of the word "loss" as set out above and it is argued that the railway company was protected by the risk-note as there was no loss of the goods by the company.

In my opinion this contention must prevail, the decision of the court below is erroneous.

Section 72 of the Indian Railways Act (Act IX of 1890) defines the responsibility of a railway administration for the loss, destruction or deterioration of goods delivered to it for carriage; the responsibility is that of a bailee as laid down in sections 151, 152 and 161 of the Indian Contract Act, subject to any special agreement executed by the consignor in a form which has been approved by the Governor General in Council.

There can be no dispute that the agreement embodied in risk-note form B is an agreement of this kind.

Under this agreement, which governs the relations of the parties in the present case, the railway administration, in consideration of its charging a lower rate for the goods, is indemnified by the consignor against all liability for any loss, destruction, or deterioration of, or damage to, the consignment from any cause whatever except for the loss of a complete consignment

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or of one or more complete packages forming part of a consignment, where the loss is due either to the wilful neglect of the railway administration, or to theft by, or to wilful neglect of its servants or agents. It follows from this that the consignor who has executed a note in this form has no claim for destruction, or deterioration of, or damage to the consignment. He can only claim in the event of loss occasioned in the manner specified in the contract. The word "loss" in this connection clearly means *loss by* the railway administration and cannot mean loss to the owner in the sense of injury to him arising out of his being deprived of his goods.

Section 151 of the Indian Contract Act, referred to in section 72 of the Railways Act, lays down that the bailee of goods is bound to take as much care of the goods bailed as a man of ordinary prudence would under similar circumstances take of his own goods of the same bulk, quality and value as the goods bailed. Section 152 of the Contract Act lays down that in the absence of a special contract the bailee is not responsible for the loss, destruction or deterioration of the thing bailed if he has taken the amount of care prescribed by section 151, and obviously the words "loss, destruction or deterioration" in section 152 refer to something which happens while the goods are still in the possession of the bailee. The word "loss" in this connection must necessarily mean "loss" by the bailee. The word must also have the same signification in section 72 and the following sections of the Railways Act and also in the risk-note form B, which is one of the forms drawn up under the provisions of the Act.

I hold, therefore, that the word "loss" as used in the risk-note must mean loss by the railway administration.

In support of this opinion I refer to a case decided by the Chief Court of the Punjab, *Changa Mal* v. *Bengal and North-Western Railway Company* (1) where it was held that the word "loss" in section 77 of the Railways Act means "loss by the railway" and not simply "loss to the owner."

In the case now before me there was no loss by the railway administration: the goods were never abstracted from its possession so as to become "lost" in the proper sense of the term, and this being so, the plaintiff firm has no case under the contract embodied in the risk-note.

The case is really one of deterioration of goods while in possession of the railway, and although the deterioration was

(1) (1897) P. R., p. 23

due to the neglect of the railway's servants the claim cannot succeed The contract of indemnity contained in the risk-note excludes all claims on account of the deterioration of goods.

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I allow this application and, reversing the decree of the court below, direct that the suit be dismissed with costs to the defendant in both courts.

Application allowed.

Before Mr Justice Piggott

1923

February, 6

SADAR SINGH KONDARI (DEFENDANT) v. AMAR SINGH KONDARI (PLAINTIFF) *

Civil Procedure Code, section 115—Revision—Subordinate court—High Court of Kumaun not such subordinate court

The High Court of Kumaun is not a court subordinate to the High Court at Allahabad for purposes of revisional jurisdiction under the Code of Civil Procedure

THIS was an application in revision against a decree of the High Court of Kumaun, dismissing a special civil appeal to that Court from a decree of the Deputy Commissioner of Garhwal, in a civil suit between the parties to the present application.

Pandit *Mangal Prasad Bhargava*, for the applicant.

The application was rejected summarily.

PIGGOTT, J .—I hold that the High Court of Kumaun is not a court subordinate to this High Court for purposes of revisional jurisdiction under the Code of Civil Procedure. There is a special procedure provided by statute, in accordance with which the Local Government can, upon cause being shown to its satisfaction refer to this Court for opinion any judgment or order passed by the Kumaun High Court. It cannot have been the intention of the Legislature that it should be left open to any dissatisfied litigant in Kumaun to evade these provisions by coming direct to this Court with a petition invoking its revisional jurisdiction I reject this application

Application rejected.

* Civil Revision No. Nil of 1923.

APPELLATE CIVIL.

1923
February, 8

Before Mr. Justice Rizvi and Mr. Justice Daniels

KANIZ FATIMA BEGAM (JUDGMENT-DEBTOR) v. RAM NANDAN DHAR DUBE AND OTHERS (DECREE-HOLDERS) [1]

Muhammadan law—Dower debt—Dower not a charge on estate unless the widow has obtained peaceable possession of her husband's estate in lieu of her dower.

A dower debt is not a secured debt but a simple debt ranking equally with other debts due from the estate. The widow's lien for dower is the right which she has, where she has taken peaceable possession of her husband's estate, to hold that estate as against the heirs of her husband until they satisfy her claim to dower. It has no application to the share which she holds in her own right as heir of her husband, still less can it give her a right to prevent another creditor against her husband's estate from recovering the amount which is due to him. *Inayat Ali* v. *Jattan Bibi* (1), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Haribans Sahai*, for the appellant.

Mr. *Sankar Saran*, for the respondents.

RIZVI and DANIELS JJ.:—This is an appeal in execution proceedings. The respondent, Ram Nandan Dhar Dube, held a simple money decree against the assets of Muhammad Ghulam Muhi-ud-din Ashraf Baksh Khan who is said to have died in 1903. In execution of that decree a share of 1 anna 7 pies and a fraction, in mauza Bhupgarh, alleged to have been inherited by Musammat Kaniz Fatima Begam, the widow of the deceased, was attached and sold. Musammat Kaniz Fatima had a claim for dower against the estate of the deceased. It is now common ground that the share which she inherited in this village from her husband was 7½ pies only, and, on her objection, the sale has been set aside except as regards this 7½ pies as to which it has been maintained. The remainder of the share owned by the deceased in this village passed to the other heirs of the deceased. Musammat Kaniz Fatima Begam instituted a suit to recover her dower debt, and, in execution of the decree which she obtained, the whole share of the deceased in the village, except the share in her possession, was brought to sale and purchased by her in the year 1918. She took objection to the sale held under the respondent's decree on the ground that she inherited only 7½ pies share in this village, and that out of this share she had made a gift in the year 1908 of 2½ pies to one Musammat Amna Bai. Her case was that only 5

[1] Second Appeal No. 1105 of 1922, from a decree of H. E. Holme, District Judge of Gorakhpur, dated the 18th of April, 1922, confirming a decree of Girish Prasad, Subordinate Judge of Gorakhpur, dated the 22nd of December, 1921.

(1) (1916) 18 Oudh Cases, 285.

pies share was liable to sale under the respondent's decree and that even this share was subject to a charge of Rs. 27,000 in respect of the unpaid portion of her dower debt. In a suit for dower which she filed she had not claimed the entire dower debt but had deducted a sum proportionate to the share which she had inherited, and it is in respect of this sum that she now claims a charge.

The courts below have held that only the 7½ pies share which she inherited can be brought to sale but have disallowed her claim to a charge and to the deduction of 2½ pies share on account of the gift. In this appeal she again presses the two objections which have been rejected by the courts below. As regards the 2½ pies share which she gave away, it has been found that on the same day she received from the donee a life interest in a much larger share, *viz.*, a share of 9 pies, in this very village: therefore the share of 7½ pies which she inherited had not really been diminished in any way and the entire share is liable to be sold. We can find no valid answer to this reasoning and none has been shown to us.

The claim to a charge is also untenable. It is well established that a dower debt is not a secured debt but a simple debt ranking equally with other debts due from the estate. The widow's lien for dower is the right which she has, where she has taken peaceable possession of her husband's estate, to hold that estate as against the heirs of her husband until they satisfy her claim to dower. It has no application to the share which she holds in her own right as heir of her husband, still less can it give her a right to prevent another creditor against her husband's estate from recovering the amount which is due to him. It is argued in the alternative that even as a simple creditor she is entitled to realize the amount of dower still due to her from the portion of the estate in her hands as heir equally with the respondent. The plea was not taken in the grounds of appeal and it is untenable. In the first place, the dower fell due on her husband's death, in 1903, and as a simple debt has long since been time-barred. In the second place, as she elected to sue for only a portion of the dower debt, order II, rule 2, of the Code of Civil Procedure would prevent her claiming any amount which she had elected to forego. A similar contention was put forward [illegible] before the Judicial Commissioner of Oudh, *Imamat Hussain v. Asghari Bibi* (1), and was rejected. It is only [illegible]

(1) (1916) 18 Oudh Cas., 32.

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KANIZ FATIMA BEGAM v. RAM NANDAN DHAR DUBE

that she could claim to treat the amount for which she did not sue as being a charge on the shares in her hands by inheritance, and the authorities are clear, and indeed it is not disputed, that a widow is not a secured creditor in respect of her claim for dower.

The appeal, therefore, fails. As the amount in respect of which the sale has been upheld is not sufficient to satisfy the respondent's claim, the learned District Judge has directed that the respondent shall be at liberty to realize the remainder of his decree from the objectors' share in other villages which he has already attached. The appellant wishes it made clear, and we declare by our decree, that the District Judge's order will not prevent the appellant from putting forward any legitimate objection she may have to sale of the estate of those shares. Subject to this the appeal is dismissed with costs.

Appeal dismissed.

1923

February, 9.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

HAZARI LAL AND ANOTHER (PLAINTIFFS) v. NIMAR AND OTHERS (DEFENDANTS).*

Landlord and tenant—Grove land Land denuded of trees and remaining vacant for twelve years Re-plantation by descendants of original grove-holders—Suit by zamindars to recover possession

A piece of land, originally grove land, was denuded of its trees and remained waste for more than twelve years. The tenants some descendants of the original grove holders planted some trees on the land and the zamindars then sued to recover possession

Held that the plaintiffs were entitled to succeed. The land in suit, having ceased to be grove land, had reverted to the zamindars, and the defendants were not, as descendants of the original grove holders, in any better position than any other person might have been who had planted trees on the land without the permission of the zamindars.

THIS was an appeal under section 10 of the Letters Patent from the judgment of a single Judge of the Court. The facts of the case sufficiently appear from the judgment under appeal, which was as follows:—

"This appeal is one in a suit by the plaintiffs for possession of a certain plot of land against the defendants grove-holders on the ground that this plot ceased to hold the character of a grove and that, therefore, the defendants grove-holders were liable to ejectment. The defence was that new trees had been planted in place of old ones 12 years ago, but on account of the infertility of the soil they look recent ones, that is, about 3 or 4 years old.

"The court of first instance held that the land had not got the character of a grove and even if it had done so, under the explanation of the *wajib-ul-arz* the defendants had a preferential right to that land as tenants. It, therefore, dismissed the suit. The zamindars went up in appeal. The lower appellate court has held that there were no trees over that land for more than 12 years and that every tree had been planted recently. The lower appellate

* Appeal No 117 of 1921, under section 10 of the Letters Patent.

court had not found the time when the new trees were planted, or whether with the express or implied consent of the zamindars. The zamindars never attempted either to eject the defendants or have rent assessed on them as tenants. The zamindars became entitled to the land when the land first ceased to retain the character of a grove, which was according to the evidence and the finding of the lower appellate court more than 12 years ago. The present suit, in my opinion, should have been dismissed on this finding alone without entering into the question how long ago it was that the defendants planted the trees at present in existence. The planting of new trees did not give them any fresh cause of action. As matters stand, this plot is now covered by trees and cannot be said to have lost the character of a grove. I, therefore, allow the appeal and set aside the decree of the court below and restore that of the court of first instance with costs in all courts."

Babu *Piari Lal Banerji*, for the appellants.

Mr. *A. P. Dube*, for the respondents.

MEARS, C. J., and BANERJI, J.:—This appeal must succeed. The fact is that there was a grove, some 18 years ago, on land formerly in the possession of the ancestors of the defendants as grove-holders. Those trees were cut down and the grove-holders abandoned the land, which thereupon reverted to the zamindars. For upwards of 12 years the land remained as waste, there were neither trees nor cultivation upon it. At a period which is certainly from 3 to 6 years prior to the commencement of the suit, the defendants planted certain trees on the groves. They are the descendants of the original grove-holders. We are of opinion that that fact gives them no preferential right or differentiates them in any way from any other person who might have come in and planted trees without the permission of the zamindar. They had no right to come upon the land after its abandonment by their predecessors in title. The learned Judge in this Court says that "as the matter stands, the plot in question is now covered with trees" as to that there is no doubt; they were, however, found to be of quite recent planting) "and cannot be said to have quite lost the character of a grove." We are obliged to differ from him because we believe the history of the land for the past 20 years to have been—and as found by the lower appellate court—first a grove, then land abandoned for upwards of 12 years and lying waste, then re-occupied by the descendants of the original grove-holders and transformed into a newly planted grove. In these circumstances the zamindars who have brought the action are entitled to the relief originally claimed by them, and we allow the appeal, set aside the decree of this Court and restore that of the lower appellate court. The appellant will have their costs of both hearing in this Court.

Appeal allowed.

Before Mr. Justice Ryves and Mr. Justice Gokul Prasad

1923 *February*, 15. RAM SEWAK RAI AND OTHERS (DEFENDANTS) v. SHEO NAIK RAI AND OTHERS (PLAINTIFFS)*

Act No. IV of 1882 (*Transfer of Property Act*), *section* 68—*Mortgage created by means of a compromise in the course of execution proceedings and remaining in effect for over fifty years*—*Dispossession of land mortgaged*—*Suit by plaintiffs mortgagees for possession of other land*—*Suit maintainable.*

In the year 1869, in the course of proceedings for the execution of a simple money decree, the parties came to a compromise which was made a rule of court. The sum due by the defendants being determined as Rs. 301, the defendants handed over certain plots of land to the plaintiffs, the usufruct of which was to be taken as interest, and the defendants were given the right to redeem at any time on payment of Rs. 301. It was further provided that if the plaintiffs were at any time dispossessed they should then proceed with the execution of their decree. This arrangement remained in force for some fifty years, when the whole of the mortgaged land was washed away. The plaintiffs then sued under section 68 of the Transfer of Property Act, 1882, asking to be given other land in place of that which had disappeared, also for other items by way of damages and Government revenue which they had been obliged to pay.

Held that the mortgage constituted by the compromise was a good mortgage, and, as it was not open to the plaintiffs to execute the original decree, they were perfectly within their right [illegible] a suit under section 68 of the Transfer of Property Act, 1882. *Abul Hasan v. Asghar Husain* (1) and *Salamat-uz-Zamin Begam v. Masha Allah Khan* (2), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Uma Shankar Bajpai*, for the appellants.

Maulvi *Iqbal Ahmad*, for the respondents.

RYVES and GOKUL PRASAD, JJ.:—In the year 1869 the predecessors of the plaintiffs put in execution a simple money decree which they had obtained against one of the defendants and the predecessor in title of the others. In those proceedings the parties came to an agreement which was embodied in an application made to court. According to that agreement it was acknowledged that the sum due to the plaintiffs was Rs. 301, and certain plots of land measuring 3 bighas 12 biswas belonging to the defendants were put into possession of the plaintiffs and it was agreed that they should take the usufruct in lieu of the interest due on the debt and the defendants could redeem on payment of Rs. 301. It was further agreed that if the plaintiffs were dispossessed, they should then proceed with the execution of the decree. The court passed orders in terms of this compromise and the plaintiffs obtained possession. They remained in possession of the whole land until the year

* Second Appeal No. 800 of 1921, from a decree of J. Allsop, District Judge of Ghazipur, dated the 4th of April, 1921, confirming a decree of Zamir-ul-Islam Khan, Munsif of Ghazipur, dated the 7th of May, 1920.

(1) (1913) 11 A. L. J., 506.
(2) (1917) I. L. R., 40 All., 187.

1884, when, during the settlement, the area in their possession was reduced to 2 bighas and 2 biswas and 13 biswansis. In the year 1916 that area was further reduced owing to diluvion, and, in 1920, the whole of it was submerged by the river. This suit was brought under section 68 of the Transfer of Property Act, requiring the defendants to give an equivalent security to the plaintiffs for the land which had disappeared, or to pay up the Rs 301 plus Rs 78 for damages and Rs. 185 for government revenue and interest said to have been paid by the plaintiffs for the defendants since the year 1877. The defendants resisted the suit on many grounds. They denied that the document created a mortgage at all, it not being stamped or registered or attested. They further said that section 68 of the Transfer of Property Act had no application because the mortgage, if any, was executed long before the Act came into force. But the two main grounds on which the suit was resisted were that according to the terms of the compromise the plaintiffs' only remedy was to execute the decree, and if they attempted to execute the decree the application would be barred by limitation, because their cause of action arose in 1916 and this suit was filed in 1920. Furthermore, if the proceedings in execution were taken out, then the items for government revenue and interest could not be added. The second main ground is that there was no contract between the parties by which the plaintiffs could recover the government revenue. The trial court in an excellent judgment decreed the suit and that decree has been upheld by the lower appellate court. The defendants come here in second appeal, and reiterate the pleas taken in the court below In our opinion they have no force. All the arguments as to want of stamp, registration and so forth in the document of 1869 are set at rest by the principles laid down in the case of *Abid Husain* v. *Asghar Husain* (1), which was confirmed by their Lordships of the Privy Council on appeal, and in *Salamat-uz-Zamin Begam* v. *Masha Allah Khan* (2). Assuming that all due formalities had not been complied with, it is far too late in the year 1920 to challenge a mortgage which has in fact been given effect to for over 50 years As to the argument that section 68 of the Transfer of Property Act does not apply to mortgages executed before the Transfer of Property Act, it is enough to say that even if it does not, the Hindu law is exactly to the same effect,

(1) (1913) 11 A. L. J., 506
(2) (1917) I. L. R., 40 All., 187.

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and that admittedly governs the parties. With regard to the government revenue it has been found by both courts, and the finding is conclusive in second appeal, that in the year 1877 the mortgagors themselves, that is the defendants, applied to the tahsildar stating that they were no longer able to pay the revenue of this land and in consequence revenue was collected from the plaintiffs. As to the argument that there was no contract originally for the payment of the government revenue, we think this is not correct. In every contract of usufructuary mortgage there is at least an implied contract for quiet possession, and this implies a contract to pay the government revenue. If the plaintiffs had not paid the government revenue, they would have been dispossessed from the land. The only other argument which it is necessary to consider is that the only remedy of the plaintiffs was in the execution department. The simple answer to this would be that the parties never contemplated the total destruction of the land by diluvion. If the land had remained the same and if dispossession had been caused by the defendants, there might have been some force in this argument but as the facts are found, we think that the proper remedy of the plaintiffs was by a suit and that the suit has been rightly decided. We, therefore, dismiss this appeal with costs.

Appeal dismissed.

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February, 15.

Before Mr Justice Muhammad Rafiq and Mr. Justice Lindsay.

BHAGWAN DAS NAIK AND OTHERS (PLAINTIFFS) *v.* MAHADEO PRASAD PAL AND OTHERS (DEFENDANTS).*

Hindu law—"Legal necessity"—Money borrowed to carry on litigation, not to protect property already in the possession of the family, but to acquire fresh property

The borrowing of money to pursue litigation, the object of which is to obtain a possible benefit for the estate, cannot be justified under the doctrine of legal necessity as known to the Hindu law, though possibly if the litigation resulted in benefit to the estate, the debt would be binding in accordance with the principle of equity embodied in the maxim—"He who enjoys the benefit ought to bear the burden also." *Indar Kuar* v *Lalta Prasad Singh* (1) and *Palaniappa* v *Devasekamony* (2), referred to

THE facts of this case are fully set forth in the judgment of the Court.

Mr. B. E O'Conor and Munshi *Harnandan Prasad*, for the appellants.

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* First Appeal No 156 of 1920, from a decree of Piare Lal, Second Additional Subordinate Judge of Basti, dated the 2nd of March, 1920

(1) (1882) I. L. R., 4 All., 532.
(2) (1917) L. R., 44 I. A., 147.

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Maulvi *Mukhtar Ahmad* (for Dr. *S. M. Sulaiman*) and Munshi *Harbans Sahai*, for the respondents.

MUHAMMAD RAFIQ and LINDSAY, JJ.:—The suit which has given rise to this appeal was brought to enforce a mortgage, dated the 24th of May, 1907, executed in favour of the predecessor in interest of the plaintiffs by three mortgagors, Mahadeo Prasad Pal, Harihar Prasad Pal and Banke Bahadur Pal.

Of these the only survivor is Mahadeo Prasad, who was impleaded as the first defendant. Banke Bahadur died without issue, while Harihar Prasad, also deceased, is now represented by his two sons and a grandson, defendants 2, 3 and 4.

The fifth defendant is a grandson of Mahadeo Prasad.

The suit was resisted by the sons and grandson of Harihar Prasad, who pleaded that the property mortgaged was joint family property and that the mortgage debt had not been incurred for any family necessity nor for any purpose which would render the family property liable for its discharge.

The lower court dismissed the suit, finding that there was no legal necessity for the loan.

The learned Subordinate Judge was pressed with the plea that at any rate, the joint family had derived a benefit from the taking of the loan. He was, however, of opinion that although the mortgage might have been binding if the family had got some benefit from the loan, it was not proved that any such benefit had accrued up to the time the suit was brought.

The facts of the case are not now in dispute. They are as follows:—

One Dan Bahadur Pal, a step-brother of the mortgagors, was the owner of a *taluqa* in the Partabgarh district in Oudh. He died in March, 1906, and Mahadeo Prasad put forward a claim to succeed him. His case was that the estate was held under a primogeniture *sanad*, descending to a single heir and that he was the heir entitled to succeed. His claim was opposed by one Adya Bakhsh Singh, the daughter's son of Dan Bahadur, who claimed under a will.

The first contest between the parties was in the revenue court, where each sought to have mutation made in his favour. Mahadeo Prasad lost his case there. The revenue court of first instance ordered mutation in favour of Adya Bakhsh, on the 8th of October, 1906, and this order was affirmed by the Board of Revenue on the 8th of February, 1907. In the year 1912 Mahadeo Prasad, with the assistance

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of a financier, one Seth Kanhaya Lal, brought a suit in the court of the Subordinate Judge of Partabgarh for recovery of the estate. He won his case in the first court but lost it on appeal in the court of the Judicial Commissioner of Oudh.

Thereafter Mahadeo Prasad obtained leave to appeal to His Majesty in Council but before the case could come on for hearing, the parties filed a compromise before the Judicial Commissioner and the appeal was withdrawn.

This fact was not within the knowledge of the court below when it gave judgment, but a certified copy of the compromise has been filed before us which shows that some property out of the estate of Dan Bahadur has been awarded to Mahadeo Prasad.

The mortgage now in suit was, as we have said, executed on the 24th of May, 1907, for a sum of Rs. 4,000.

All this money, except a sum of Rs. 401-2-0, was left with the mortgagee to pay off four usufructuary mortgages executed between the 6th of June and the 30th of October, 1906. The balance, Rs. 401-2, was said to have been taken by the mortgagor to defray the stamp and registration charges in connection with the mortgage and to meet unspecified household expenses.

The learned Judge of the court below finds that the sums borrowed under the four mortgages of 1906 were spent in support of the claim for mutation put forward by Mahadeo Prasad in the revenue courts—a claim which, as already stated, failed. He further finds that the mortgagee knew that these sums had been borrowed for the purpose of that litigation.

As regards the balance of Rs. 400 odd his finding is that no legal necessity for the borrowing of this sum was proved, and that the mortgagee made no inquiry.

It has been argued before us, as it was in the court below, that on the facts so found it should be held that there was legal necessity for the debt on the ground, apparently, that Mahadeo Prasad has derived some benefit from the litigation which was finally determined by the compromise filed in the court of the Judicial Commissioner. And it is said that this benefit accrues not only to Mahadeo Prasad but to all the members of the family, in virtue of an agreement entered into between them and Mahadeo Prasad.

Admittedly there is no evidence of this agreement upon the record. It is said that it was registered in Book No. IV of the Registration department and the plaintiffs were, under the

rules of the department, not entitled to ask for a copy of it. We are also told that the plaintiffs tried to get Mahadeo Prasad into the witness-box in the court below but were unable to secure his attendance.

Coming to the question of legal necessity, we are not aware of any rule of Hindu law which recognizes that the borrowing of money for the purpose of maintaining a suit to recover an estate which has never belonged to the joint family is a legal necessity. In the case cited before the lower court, *Indar Kuar* v *Lalta Prasad Singh* (1), it was held that a mortgage executed by a widow to raise funds to enable her to sue for an estate to which her deceased husband had an alleged right of succession, which he had never sought to enforce, was not a mortgage executed for "legal necessity" within the Hindu law. At page 543 of the report the learned Judge who delivered the judgment says :—

"In my opinion a distinction should be worn to drawn between litigation undertaken to protect the property, and litigation the object of which is to obtain a possible *benefit* for the estate. The former relates to the retention of that which has already been acquired and is in actual possession; the latter relates to that which may possibly be acquired; as a general rule the former class of litigation would no doubt amount to legal necessity, and in regard to the latter class of litigation it may be laid down that if such litigation ends in actual benefit to the estate, any alienation which may have been necessary for prosecuting the litigation would be valid and binding upon the reversioner on the analogy of the maxim—He who enjoys the benefit ought to bear the burden also"

According to what is stated here the borrowing of money to pursue litigation the object of which is to obtain a possible benefit for the estate cannot be justified under the doctrine of "legal necessity" as known to the Hindu law, though possibly if the litigation resulted in benefit to the estate the debt would be binding in accordance with the principle of equity embodied in the maxim quoted.

In *Palaniappa* v *Devasikhamony* (2) it was laid down that the expression "benefit of the estate" as used in the decision with regard to the circumstances justifying an alienation by the manager for an infant heir, or by the trustee of a religious endowment, cannot be precisely defined.

At page 155 of the report their Lordships observe :—

"No indication is to be found in any of them as to what is, in this connection, the precise extent of the things to be included under the description "benefit to the estate". It is impossible, their Lordships think, to give a precise definition of it applicable to all cases and they do not attempt to do so. The preservation, however, of the estate from extinction, by defence against hostile litigation affecting it, the protection of it or persons

(1) (1882) I. L. R., 4 All., 532
(2) (1917) L. R., 44 I. A., 147.

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from injury or deterioration by inundation, these and such like things would obviously be benefits. The difficulty is to draw the line as to what are, in this connection, to be taken as benefits and what not."

There is nothing in these remarks to encourage the notion that an adventure in the shape of a speculative suit which might possibly bring profit to the estate could properly be regarded as a "benefit to the estate" or a "legal necessity." Their Lordships' observations rather import that any act for which the character of "legal necessity" or "benefit to the estate" can be claimed must necessarily be a defensive act—something undertaken for the protection of the estate already in possession—not an act done with the purpose of bringing fresh property into possession, and which may or may not be successful under the chances attending upon litigation.

We are satisfied, therefore, that the case of legal necessity put forward in the present suit cannot succeed. There remains the question whether the plaintiffs can succeed either wholly or in part, in accordance with the equitable doctrine mentioned in the judgment in the case of *Indar Kuar* v. *Lalta Prasad Singh* (1), assuming that this doctrine does apply.

It is argued that it is now proved that the estate has benefited inasmuch as Mahadeo Prasad has secured some portion of the *taluqa* under the terms of the compromise.

The first difficulty in the way of the plaintiffs is that the benefit, such as it is, has accrued to Mahadeo Prasad himself and not to the joint family of which he is a member. As has been mentioned already, the plaintiffs have failed to prove any agreement between Mahadeo and the other members of the family to share any benefit which might result from the litigation.

And then there is a second difficulty which the plaintiffs cannot possibly surmount. It is clear that whatever benefit has accrued from the compromise has not been derived from the fund secured by the mortgage.

We know that the money advanced by the plaintiffs' predecessor was applied in the repayment of sums which had been borrowed to finance Mahadeo Prasad in the mutation proceedings. Mahadeo finally lost his case in the revenue courts in February, 1907, and there can be no question of his having got any benefit there.

It was not till the year 1912 that he began his suit in the civil courts and it is proved that the funds which enabled him

(1) (1892) I. L. R., 4 All., 532.

to maintain this litigation which terminated in the compromise were advanced, not by the plaintiffs, but by Seth Kanhaya Lal.

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In no way, therefore, is it possible for the plaintiffs to trace any connection between the money advanced by them and any benefit which Mahadeo Prasad has succeeded in winning is the result of his claim in the civil courts. The plaintiffs cannot succeed and their suit was rightly dismissed by the court below whose decree we affirm. The appeal fails and is dismissed with costs to the respondents.

Appeal dismissed.

Before Mr Justice Piggott and Mr Justice Walsh

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February, 15.

MOHAN LAL AND ANOTHER (PLAINTIFFS) v. GANGA PRASAD AND OTHERS (DEFENDANTS) *

Civil Procedure Code, order XXXII, rule 4(4)—Guardian ad litem*—Application by a vakil appointed by the court as guardian of minor respondents for an order on the appellant to deposit costs of minors—Appeal*

A vakil of the court appointed by the court as guardian *ad litem* of a minor brought in an officer of the court for the purposes of order XXXII, rule 4, of the Code of Civil Procedure. The appellate court has therefore jurisdiction to make at the request of such guardian an order under that rule for the deposit of costs likely to be incurred by the minor in defending the appeal.

THIS was an application, made in the course of a first appeal, by one Sital Prasad, a vakil practising at Agra, who had been appointed by the Subordinate Judge of Agra as guardian *ad litem* to two minors, defendants, who were now respondents to the appeal, for an order under rule 4(4) of order XXXII of the Code of Civil Procedure directing the appellant to deposit a sum of money on account of the costs likely to be incurred by the minors in defending the appeal.

Munshi *Narain Prasad Asthana*, for the appellants.

Munshi *Gulzari Lal* and Munshi *Baleshwari Prasad*, for the respondents.

PIGGOTT and WALSH, JJ. Prior to the hearing of these connected appeals a question has been raised by a petition presented to this Court from Mr. *Sital Prasad*, vakil, of Agra. It appears that there are two minors Bala Prasad and Nanhe, whose interests are concerned in both these appeals. The court having failed to find any other person fit and willing to act as their guardian for the purposes of these appeals, has appointed Mr. *Sital Prasad*, vakil, to be such guardian.

* Application in First Appeal No. 375 of 1919, from a decree of Govind Saran Mathur, Officiating Subordinate Judge of Agra, dated the 17th of June, 1919.

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That gentleman appeals to us to make a proper order as to the costs to be incurred by him in order that he may obtain the legal assistance necessary to the proper representation of the minors at the hearing of the appeals. We have been asked to consider whether such order can properly be made by us under order XXXII, rule 4, of the Code of Civil Procedure. We are clearly of opinion that a vakil of the court is an officer of that court for the purposes of this rule, and that therefore we have jurisdiction to make the order prayed for.

We direct accordingly that the appellant, Pandit Mohan Lal, do pay a sum of Rs. 75 as a fee for counsel to appear and represent the interests of the minor respondents at the hearing of the two appeals. Previous payment of the fee must be certified to us before the hearing of the appeals. We allow two weeks' time to the said appellant for the purpose.

Application granted.

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Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji.

VILAYAT HUSAIN AND ANOTHER (PLAINTIFFS) v. MISHRAN AND OTHERS (DEFENDANTS).*

Pleadings—Right of defendant to set up and prove a joint fraud of himself and plaintiff—Maxim—" In pari delicto potior est conditio possidentis."

In all cases where a plaintiff is relying upon a deed, the defendant is entitled as of course to give evidence of the circumstances under which the document came into existence. When those circumstances include an allegation of a joint fraud by both plaintiff and defendant, the particulars of that fraud must be pleaded; and it is then the duty of the court to look into the matter, and if the court comes to the conclusion that the parties were acting together with a view to perpetrate a fraud, and did in fact perpetrate that fraud, and that there is no difference in the degree of guilt of the plaintiff (who is asking the court to give him some help) and that of the defendant, the duty of the court is not to assist either party. *Raghupati Chatterjee* v. *Nrishingha Hari Das* (1). *Taylor* v. *Chester* (2) and *Herman* v. *Jeuchner* (3), referred to. *Sidlingappa bin Gauchappa* v. *Hirasa bin Tukasa* (4), dissented from.

THIS was an appeal under section 10 of the Letters Patent from the judgment of a single Judge of the Court.

The facts of the case are fully set forth in the judgment of the Chief Justice.

Pandit *Uma Shankar Bajpai* and *Janki Prasad*, for the appellants.

Munshi *Haribans Sahai*, for the respondents.

MEARS, C. J. —This is an interesting case which has given rise to a discussion as to under what circumstances a

* Appeal No. 95 of 1921, under section 10 of the Letters Patent.

(1) (1922) 71 Indian Cases, 1.
(2) (1869) L. R., 4 Q. B., 309.
(3) (1885) 15 Q. B. D., 561.
(4) (1907) I. L. R., 31 Bom., 405.

defendant can properly plead and rely upon facts showing that he and the plaintiff were *in pari delicto* The circumstances are as simple as they can be Sheikh Vilayat Husain and Musammat Imaman were, on the 12th of September, 1904, indebted to various creditors. There was at least one decree outstanding which was in the course of execution In that position of affairs they turned to Muhammad Ismail, who was a friend, and who agreed with them that a fictitious deed of sale of property should be executed in his favour, so that that might serve as a shield against the demands of creditors. That deed of sale was in fact executed on the 12th of September, 1904, and no consideration passed from Muhammad Ismail to the ostensible vendors Muhammad Ismail put forward a claim and got this very property released from the operation of the decree. Therefore the contemplated fraud was successfully carried out. It is probable that Muhammad Ismail collected the rents for some period; but if this was done, it was only to make the transaction of the 12th of September, 1904, appear to be a genuine and valid one Under some circumstances which are not very clear, on the death of Muhammad Ismail, Vilayat Husain and Musammat Imaman got possession of the house and began to collect the rents themselves. In this way they asserted possession and dominion over the house in question That was in the year 1909

On the 30th of June, 1917, after a lapse of some 9 years, the plaintiffs, who are the heirs of Muhammad Ismail, brought the suit to recover possession on the strength of the sale-deed of the 12th of September, 1904

It is now important to turn to the pleadings to see how the case was framed by the parties As one would expect, the pleading in the plaint was quite simple, it was based upon a sale-deed, the death of Muhammad Ismail and the realization of rents by the defendants To that apparently genuine claim the defendants set up what they contended was the true story; that is to say, they drafted pleas which showed, if they were true, and as they were subsequently found to be true, that Vilayat Husain and Muhammad Ismail were *in pari delicto*, that is to say, not one man but both were jointly engaged on a fraud in which each was equally culpable.

If that written statement was a written statement in accordance with the rules and with the procedure, then it had to be considered by the court and proper issues framed. Nobody seems to have suggested that the pleading was in any way

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improper, and indeed there can be no question that this pleading was the proper pleading, and the points urged in it and the facts set out in it were proper to be raised and those which it was the duty of the court to consider, and, in fact, the court did consider this matter and the court allowed the genuineness of the document to be impeached.

In all cases where a plaintiff is relying upon a deed, the defendant is entitled as of course to give evidence of the circumstances under which the document came into existence. When those circumstances embrace and include an allegation of a joint fraud by both plaintiff and defendant, the particulars of that fraud must be pleaded; and it is then the duty of the court to look into the matter, and if the court comes to the conclusion that the parties were acting together with a view to perpetrate a fraud, and did in fact perpetrate that fraud, and that there is no difference in the degree of guilt of the plaintiff (who is asking the court to give him some help) and that of the defendant, the duty of the court is not to assist either party; in other words, the duty of the court is to dismiss the claim, because the court having then in its knowledge that it has before it two persons equally guilty of fraud will not assist either of them.

The position, therefore, of this matter is that the decision of the lower appellate court is the right decision and that decision must be restored. But inasmuch as there has been considerable discussion on this matter, it may be useful, without going into great length, to mention some authorities, so that there can be no question as to the propriety of pleading and entertaining any evidence of the allegations of a joint and equal fraud of plaintiff and defendant. An example of that type of pleading will be found in *Taylor* v. *Chester* (1). There, by way of a special reply, all the facts were stated which went to show that, if those facts were true, the plaintiff and defendant were *in pari delicto*. It may be noticed that in that case the defendant took issue on the reply and raised the precise question as to whether a pleading of this nature was a fit and proper pleading to be entertained by the court. The court decided that it was, went into the whole facts of the case, and, in the course of its judgment, said "The maxim that '*in pari delicto potior est conditio possidentis*,' is as thoroughly settled as any proposition of law can be. It is a maxim of law, established, not for the benefit of plaintiffs or defendants, but

(1) (1869) L. R., 4 Q. B., 309.

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is founded on the principles of public policy, which will not assist a plaintiff who has paid over money, or handed over property in pursuance of an illegal or immoral contract, to recover it back, for the courts will not assist an illegal transaction in any respect." The court also pointed out the further proposition that if a plaintiff can go into a court and make out a complete case without himself disclosing any fraud, then he may be entitled to recover. In all cases, however, where a plaintiff has to produce a document, he can, either by interrogatories, or when he is actually present in the box, be asked questions under cross-examination which will show that his first story to the court as regards the circumstances under which the document was executed is not a true story, and the defendant is entitled, if he has put on record the proper pleadings, to go into the whole of the circumstances and show that each party is *in pari delicto*. There are many other English authorities to that effect but the most concise summary of law is to be found in Broom's Legal Maxims, 8th Edition, at pages 561 and 562 :—

"Once it is established that the parties are *in pari delicto*, the courts will not assist an illegal transaction in any respect, that is to say, the person who has asked the court to do something in his favour will fail." "Not only," says the learned author, "*in æquali jure*, but likewise *in pari delicto*, is it true that *potior est conditio possidentis*; where each party is equally in fault, the law favours him who is actually in possession; a well-known rule which is, in fact, included in that more comprehensive maxim to which the present remarks are appended. 'If' said BULLER, J., 'a party comes into a court of justice to enforce an illegal contract, two answers may be given to his demand; the one, that he must draw justice from a pure fountain, and the other, that *potior est condetio possidentis*'."

Our attention has been drawn to the case of *Sidlingappa bin Ganeshappa* v. *Hirasa bin Tukasa* (1) and it is contended that the facts of that case are so identical with the facts of the case under consideration that we are bound by the course that that case took. If one studies that case, one will see that no attention was concentrated upon the question with which we are concerned here, which is whether a defendant can in a pleading raise facts which show that he and the plaintiff were *in pari delicto*. If he can raise such facts, he can prove such facts; and if he proves such facts, he can bring himself within the principle of law which has been laid down in the

(1) (1907) I. L. R., 31 Bom., 405.

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case to which we have referred above, and in others which are to be found appended to the notes in Broom's Legal Maxims. The court was referred to *Roberts* v. *Roberts* (1) but the court does not seem to have paid any attention to the principle of *in pari delicto potior est conditio defendentis*, and that case is certainly not in harmony with the principle of subsequent decisions, of which *Taylor* v. *Chester* (supra) and *Herman* v. *Jeuchner* (2) are characteristic examples, and appears to us of doubtful authority. The essence of the case now under consideration is that the defendants set up the joint iniquity of Vilayat Husain and Muhammad Ismail—they were alleging throughout the concerted plan by which both the plaintiffs and the defendants, in equal degree of wrong-doing, had agreed to take a course which would defeat and did in fact defeat, creditors. In the case of *Sidlingappa bin Gangshappa* v. *Hirasa bin Tukasa* (3) this point does not appear to have been urged upon the court—at all events it finds no place in the judgment. We have no doubt whatever that the practice is that a defendant may always allege facts, that he and the plaintiff were together jointly equally guilty of a contemplated and executed fraud. Provided the pleading contains proper facts, an issue has to be found on that, and it is established to the satisfaction of the court that the plaintiff and defendant were jointly and equally engaged upon a fraud, it is then the duty of the court to give no assistance to the plaintiff, the position being that the plaintiff must come into court with clean hands.

On the question of *pari delicto* one has to consider all the facts, and that requires an examination of the circumstances attending the execution of the document, if it be a document which is impeached. In this case the wrong-doing was in and around the 12th of September, 1904. The parties who were guilty of that wrong-doing were Vilayat Husain and Muhammad Ismail. Neither of them could have obtained any assistance from any court after the contemplated fraud had been carried out, and that bar applies also to people claiming directly through them.

Mr. *Uma Shankar Bajpai*, after the close of the arguments—and indeed after delivery of judgment—called our attention to the very recent case of *Raghupati Chatterjee* v. *Nrishingha Hari Das* (4). There the Calcutta High Court, on

(1) (1819) 2 Barn and Ald., 367
(2) (1885) 15 Q B D, 561
(3) (1907) I L R, 31 Bom., 405
(4) (1922) 71 Indian Cases, 1.

a full consideration of all the authorities, came to the same conclusion at which we had arrived

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We are, therefore, of opinion that this appeal must be allowed and the decree of the learned Judge of this Court set aside and the decree of the lower appellate court restored. The result will be that the plaintiff's suit will be dismissed. Each party must pay his own costs throughout

BANERJI, J.—I agree.

Appeal allowed.

Before Mr. Justice Piggott and Mr. Justice Walsh

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February, 16.

UMRAO BEG (JUDGMENT-DEBTOR) v. MUKHTAR BEG AND OTHERS (DECREE-HOLDERS) *

Civil Procedure Code, order XXI, rule 15—Execution of decree—Joint decree for costs against one defendant—Payment of the entire amount of costs out of court to one plaintiff only no defence to an application for execution of the decree for costs by the remaining plaintiffs

In a suit for partition there were fifteen plaintiffs and one defendant. The plaintiffs obtained a joint decree for costs against the defendant. The defendant paid the whole of the costs awarded to one of the plaintiffs, who was his sister, and she certified to the court that she had realized the full amount of the costs awarded.

Held, on application being made by the remaining plaintiffs for execution of the entire decree for costs, that the payment (if it was made) of the full amount of the costs to one only of the joint decree holders and the certifying of such payment to the court was no defence to the application of the remaining plaintiffs, which was granted to the extent of their share of the costs.

THE facts of this case are fully stated in the judgment of the Court.

Maulvi *Iqbal Ahmad* and The Hon'ble *Saiyid Raza Ali*, for the appellant.

Dr *S. M. Sulaiman* and Dr *Surendra Nath Sen*, for the respondents.

PIGGOTT and WALSH, JJ.:—This is an execution first appeal arising out of an unfortunate litigation which has already occupied our attention in connection with regular first appeal No. 39 of 1920. The point which we are now called upon to decide is, however, distinct from any of the questions raised in the connected appeal above referred to. The suit was one for partition. There were fifteen plaintiffs in the case, and, in the preliminary decree as drawn up, these plaintiffs were awarded their costs against the defendant. There was an appeal to this Court and also petition of cross-objections on the part of the plaintiffs, with the result that the preliminary decree passed by the trial court was modified in favour of the

* First Appeal No. 314 of 1919, from a decree of Govind Sarup Mathur, Subordinate Judge of Agra, dated the 26th of July, 1919.

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plaintiffs and the defendant was made liable to a further sum on account of costs. The application with which we have to deal is an application by fourteen of the plaintiffs, Nos. 2-15, asking that the entire decree for costs may be executed, subject to such orders as the court may see fit to pass for the preservation of the rights of the first plaintiff, Musammat Faiyazi Begam, who had declined to join the application for execution. The attention of the execution court was, therefore, distinctly drawn to the provisions of order XXI, rule 15, of the Code of Civil Procedure, but it is by no means clear from the order passed whether that court applied its mind to those provisions. The point of the matter is that the first plaintiff, Musammat Faiyazi Begam, is the own sister of the judgment-debtor defendant, Mirza Umrao Beg, and it has been made evident enough, not only from the proceedings in this execution matter, but from proceedings which have taken place in the court below in connection with the preparation of the final decree for partition, that the brother and sister have come to some sort of arrangement amongst themselves. In connection with that arrangement, no doubt, the first plaintiff, Musammat Faiyazi Begam, has certified to the court below that she has realized the full amount of the costs awarded under the decree which the remaining plaintiffs are now seeking to execute. The court below has rightly held that the decree for costs as drawn up operates, independently of the rest of the decree, as a simple money decree, jointly in favour of all the plaintiffs. It follows as a natural consequence that it can only be executed by all the decree-holders jointly, or by some only of the decree-holders subject to the provisions of order XXI, rule 15, of the Code of Civil Procedure above referred to. It also follows that no one of the decree-holders is competent to grant full discharge of the decree out of court, or to certify to the court complete satisfaction of the decree, without the concurrence of all the decree-holders. So far the decision of the court below is correct. If the judgment-debtor has really paid the entire amount of the decree to his sister, but has done so with the obvious intention of evading the provisions of order XXI, rule 15, of the Code of Civil Procedure, he must take the consequences if the result is in fact to compel him to pay the whole amount of the decree, or any part thereof, twice over. The real difficulty in the case turns on the proper application of the discretion allowed to the court by order XXI, rule 15, of the Code of Civil Procedure. We have no doubt

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that this is a wide discretion and that the court, so long as it insists upon payment of the entire amount of the decree by the judgment-debtor, has authority to make such adjustment of the rights of the decree-holders *inter se* as it may think equitable and proper. Those rights, however, are the rights under the decree. In the present instance the court below seems to have assumed that if there be a decree in favour of a large number of plaintiffs, it must be understood that they are entitled to divide the money amongst themselves *per capita*. Even on this basis we find it a little difficult to understand why the court below has given the applicants for execution 7/8ths of the decretal amount, seeing that they represent 14 out of 15 plaintiffs. We think, however, that the court, without going behind the terms of the decree, or entering into any question which, if it was to be litigated at all as between the plaintiffs, should have been adjudicated upon prior to the passing of the decree and not after, is nevertheless entitled for the purposes of order XXI, rule 15, of the Code of Civil Procedure to examine the pleadings and to inform itself as to the precise position of the plaintiff as they came into court. Once this is done, it becomes obvious that the two sets of plaintiffs, namely Musammat Faiyazi Begam as the plaintiff of the first party and the remaining plaintiffs, as plaintiffs of the second party, were equally interested in the result of the litigation. The logical way, therefore, of adjusting the accounts between them would be to see that they each got half of the money due under the decree for costs. Now Musammat Faiyazi Begam has committed herself to certifying to the court that she has been paid in full. Her interests, therefore, are sufficiently protected under the terms of the rule in question by taking note of the fact certified by her. The result we thus arrive at is that execution of this decree should have been permitted in favour of the remaining decree-holders to the extent of a half share in the costs. We modify the order of the court below accordingly. Parties will pay and receive costs of this appeal in proportion to failure and success.

Order modified.

1923 February, 21.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Gokul Prasad.

MIR SINGH (DEFENDANT) *v.* MAKHAN (PLAINTIFF).*

Landlord and tenant—Tenant forcibly dispossessed and another put in possession—Crop raised by new tenant—Crop sold in course of proceedings under section 145 of the Criminal Procedure Code—Suit to recover price—Jurisdiction—Civil and Revenue Courts.

In the course of proceedings under section 145 of the Code of Criminal Procedure in respect of certain plots of land and a sugarcane crop existing thereon the crop was sold and the price placed in deposit. Both parties to these proceedings claimed the price, and one of them brought a suit in the civil court. In this suit it was found that the defendant had at one time been the tenant of the land on which the crop was grown, but that the zamindar had forcibly dispossessed him and put in the plaintiff, and that it was the plaintiff who had raised the crop.

Held that the plaintiff had rightly brought his suit in the civil court and was entitled to the whole of the price of the crop which he had raised.

THE facts of this case are fully set forth in the judgment of the Court.

Mr. *S. Abu Ali* and Munshi *Kailas Chandra Mital*, for the appellant.

Dr. *Kailas Nath Katju*, for the respondent.

BANERJI and GOKUL PRASAD, JJ.:—This appeal and the connected second appeals Nos. 1408 and 1643 of 1921 arise out of a suit brought under the following circumstances. The defendant made an application to the criminal court under section 145 of the Code of Criminal Procedure in respect of certain plots of land and the sugarcane crop which existed on that land. Both parties claimed the sugarcane crop and claimed to be in possession. The criminal court caused the sugarcane crop to be sold by auction and the amount realized by the sale was Rs. 1,450-8. After the case under section 145 of the Code of Criminal Procedure was decided, the present plaintiff applied to the criminal court for payment to him of the aforesaid amount which had been placed in deposit with one Banarsi Das. The criminal court referred the plaintiff to the civil court to have his title to the money determined. Thereupon the present suit was brought for a declaration that the aforesaid sum of Rs. 1,450-8 was due to him, the sugarcane crop having been raised by him and not by the defendant. The plaintiff no doubt stated that he was the sub-tenant of the defendant in respect of the four plots of land on which the sugarcane crop had been grown, but both the courts below have found that this statement was not true. The court of first instance came to the conclusion that the four plots of land on which the sugar-

* Second Appeal No. 1407 of 1921, from a decree of H. J. Collister, Additional Judge of Meerut, dated the 9th of July, 1921, modifying a decree of Har Govind Bajaj, Subordinate Judge of Muzaffarnagar, dated the 17th of December, 1920.

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cane crop had been grown formed the cultivatory holding of the defendant, that the zamindar had dispossessed the defendant and had put the plaintiff into possession and that the plaintiff had sown the crop. That court was of opinion that as the land was the cultivatory holding of the defendant, the plaintiff should be awarded only a half of the value of the crop although the whole crop, according to the court's finding, had been raised by the plaintiff alone. One fails to understand on what principle this decree was made. If the crop was raised by the plaintiff it belonged to him. He may not have any title to the land on which the crop was grown, but the crop itself was his property and therefore he was entitled to the price of the sugarcane which he had raised on this land. From this decree of the court of first instance both parties appealed. The learned Judge of the lower appellate court found that the defendant had failed to prove that he had raised the crop and he came to the conclusion that the crop had been grown by the plaintiff. It is true that he said in his judgment that inasmuch as the defendant had admitted in the revenue court that the crop had been sown by the plaintiff, the onus lay upon him to prove that he had grown the crop. The question of onus did not at all arise in the lower appellate court as both sides had given evidence. In this case the allegation of one party was that the sugarcane crop belonged to him and that of the other party was that he was the owner of the crop. No third party was involved. The crop was either raised by the plaintiff or by the defendant. If the defendant failed to prove that he had raised the crop, the inevitable conclusion was that it was the plaintiff who raised it, and the finding of the lower appellate court is that the crop had been grown by the plaintiff. That court further found that the landlord forcibly dispossessed the defendant and put the plaintiff into possession, and that during the period of the plaintiff's possession he had planted the sugarcane and raised the crop. That being the finding of the lower appellate court, it was the plaintiff who was entitled to the crop and to the amount which represented the value of the crop. There was no principle of equity under which the defendant could take away or appropriate any portion of the crop. If the landlord wrongfully dispossessed him, his remedy was to sue for restoration of possession and for compensation from the landlord for wrongful dispossession; but he could not claim any portion of the crop existing on the land which had been grown not by him but by the plaintiff. The learned

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Judge was, therefore, wrong in our opinion in holding that upon some equitable principle the defendant was entitled to one-third of the crop and in making a decree in the plaintiff's favour for two-thirds only. From this decision of the learned Judge the three appeals before us have been preferred, two of them, namely S. A. Nos. 1407 and 1408 of 1921, by the defendant and No. 1643 by the plaintiff. It is urged on behalf of the defendant that the civil court was not competent to entertain the suit and that the suit ought to have been instituted in the revenue court. This plea is clearly untenable. The matter in controversy between the parties was the value of the sugarcane crop, and what the plaintiff claimed was a declaration to the effect that he was entitled to the value of the crop. There was no dispute in the suit as to the title to the land on which the crop was grown. Incidentally the question might arise, by what title the plaintiff had grown the crop. He no doubt said that he was the sub-tenant of the defendant, but he failed to substantiate that statement, and the court came to the conclusion as stated above, that the zamindar had wrongfully dispossessed the defendant and had put the plaintiff into possession. This act of the zamindar may have been improper, but there was no question of the title to the land in the present suit, and consequently the suit could not be brought in the revenue court. Mr. *Mittal* called our attention to the ruling in *Ram Singh* v. *Giraj Singh*, (1), but that ruling manifestly has no application to a case of this kind.

The next contention was that the court below had wrongly placed the onus of proof on the defendant. We have already commented on this matter. There was no question of onus of proof in the case before the lower appellate court, both sides having given evidence, all that it had to decide upon the evidence was whether the crop belonged to the plaintiff or to the defendant. If the crop had not been grown by the defendant, the only other person who could have grown it was the plaintiff and the finding was that it was the plaintiff's crop. Therefore the appeals which have been preferred by the defendant are without force and must be dismissed. As regards the plaintiff's appeal, it must succeed. Upon the finding that the crop was raised by the plaintiff, he is entitled to the amount which was realized by sale of the crop, and to this amount the defendant has no title. The whole of the plaintiff's claim ought to have been decreed. The result is that we dismiss the appeals

(1) (1914) I. L. R., 37 All., 41.

of the defendant with costs and decree the plaintiff's appeal with costs.

Appeal dismissed.

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1922 *January*, 20.

Before Mr Justice Piggott and Mr Justice Walsh

CHATURBHUJ AND ANOTHER (PLAINTIFFS) *v* GOVIND RAM AND OTHERS (DEFENDANTS).*

Hindu law—"Antecedent debt"—Decree for pre-emption—Money required to take advantage of a decree for pre-emption not an antecedent debt.

Money needed to pay up a decree for pre-emption in favour of the borrower is not an "antecedent debt" such as will support a mortgage of joint family property. *Natha* v. *Kundan Lal* (1), dissented from

THE facts of this case are fully stated in the judgment of PIGGOTT, J.

Munshi *Gulzari Lal*, for the appellants.

Pandit *Shiam Krishna Dar* and Munshi *Panna Lal*, for the respondents.

PIGGOTT, J.—The plaintiffs, who are the appellants in this Court, sued Gobind Ram and his minor sons upon two mortgages of the 9th of September, 1911, and the 25th of June, 1912. The question in issue in the court below and again in this Court was whether the joint ancestral property in the hands of Gobind Ram can be made liable for the whole, or for any part, of the consideration under these two deeds. The essential circumstances are as follows:—On the 20th of July, 1911, Gobind Ram had obtained a pre-emption decree entitling him to acquire certain property in a village called Loharra, on condition of his depositing a sum of Rs. 1,072, within a prescribed time. He borrowed this amount from the plaintiffs under the deed of the 9th of September, 1911, by hypothecating under the said deed not only the share in village Loharra which he proposed to acquire, but also certain ancestral family property in his hands. He did not confine himself to raising the money necessary to acquire the property in Loharra under the pre-emption decree. He borrowed Rs. 1,246 more in order to pay off two promissory notes. He acknowledged the previous receipt of Rs. 82 for incidental expenses and other unspecified necessities and he was paid Rs. 1,100 in cash on registration. The total consideration for this bond, therefore, comes to Rs. 3,500. Subsequently, there was an appeal in the pre-emption case and the result was that in order to secure the benefit of the pre-emption decree, Gobind Ram had to pay a

* First Appeal No. 222 of 1919, from a decree of Sudershan Dayal, First Additional Subordinate Judge of Aligarh, dated the 29th of March, 1919.

(1) (1916) I. L. R., 38 All., 243.

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further sum of Rs. 750. For this purpose, he executed the second of the two mortgages in suit for a nominal consideration of Rs. 800, of which Rs. 45 was received in cash and Rs 5 was set down as due on account of the interest on the older bond of the 9th of September, 1911. The court below has held that the property acquired by Gobind Ram in village Loharra is liable for the full amount of the debt due under both mortgages according to their terms, and this finding is not challenged by the defendants. With regard to the remainder of the consideration, the finding is that two antecedent debts due under promissory notes for a total sum of Rs. 1,246 were in fact paid up out of the consideration of Rs. 3,500 received under the bond of the 9th of September, 1911. Consequently, the whole of the property hypothecated under the deed, including the joint ancestral family property, has been made liable for this amount. To this part of the decree again, the defendants have submitted. The appeal before us is by the plaintiffs. They contend :—

Firstly, that the joint ancestral family property ought to have been made liable at least for the two sums of Rs. 1,072 and Rs. 750 applied to the satisfaction of the pre-emption decree. Secondly, that the sum of Rs. 1,100 paid in cash at the registration of the older deed was, in fact, borrowed in order to pay off antecedent unsecured debts and was applied to that purpose. On the first point, there is one authority of this Court, the case of *Nathu* v. *Kundan Lal* (1), which appears to support the contention of the plaintiffs. We do not think that this decision can be regarded as good law in view of the subsequent pronouncements of their Lordships of the Privy Council on the question of antecedent debt, to which it is not necessary for us to refer in detail. When all is said and done, the pre-emption decree merely gave Gobind Ram the option of acquiring certain property at a certain price. He was laid under no obligation to acquire the property unless he chose. It seems to us that it would be very dangerous to hold that the money required to satisfy the pre-emption decree was an antecedent debt due from Gobind Ram on the date on which each of these mortgages, respectively, was executed. On the second point, we have come to the conclusion that we cannot come to a decision without exercising our power under order XLI, rule 27, of the Code of Civil Procedure to call for certain further evidence. We find that, as early in the trial of the suit as the

(1) (1910) I. L. R., 33 All., 243.

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29th of January, 1919 the plaintiffs had made a full disclosure of their case regarding this item of Rs. 1,100. They mentioned the names of four creditors of Gobind Ram for whose satisfaction they allege the money to have been borrowed and whom they allege to have been actually paid off by means of this money The case was set down for hearing on the 10th of March, 1919, and, on the 7th of March, the plaintiffs applied for summonses to issue against the four creditors whom they had already named to the court. Summonses were duly served, but the witnesses in question did not present themselves before the court at the hearing of the 20th of March, 1919. The plaintiffs applied for an adjournment to enable them to summon these witnesses but were refused. We cannot agree with the court below that there was any laches on the part of the plaintiffs in this matter. So far as appears from the record, they did their best to get these witnesses before the court. We think this is a case in which the court from whose decree the appeal before us is preferred has refused to admit evidence which ought to have been admitted. We accordingly send down the case to the court below with directions to afford the plaintiffs a further opportunity of requiring the attendance of those four witnesses in such manner as they may think proper. The witnesses should be directed not merely to attend the court to give evidence, but to bring with them any documents in their possession relating to the alleged transactions between them and Gobind Ram. When this evidence has been duly recorded, the record should be returned and set down for further hearing of the appeal to this Court on the earliest convenient date. The four witnesses in question are Bal Makund, Ganga Nath, Mansukh Ram and Jai Jai Ram mentioned in the court's rubkar of the 29th of January, 1919, and summoned at the trial under the plaintiffs' application of the 7th of March, 1919.

WALSH, J.—I agree. With reference to the case of *Nathu* v. *Kundan Lal* (1) which has been relied on, I find a difficulty in following the reasoning contained in the judgment.

Whatever else it may be, a condition providing that the payment of a sum of money shall depend upon enforcing or taking up a pre-emption decree is certainly not a debt. The transaction, no doubt, was antecedent, but it does not result in a debt. There is no person to enforce it if the pre-emptor does not choose to act upon this decree. I entirely agree with what

(1) (1910) I. L. R., 33 All., 242

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my brother has said that the passage in the judgment of their Lordships of the Privy Council in I. L. R., 39 All., at p. 449 clearly shows that the decision in *Nathu* v. *Kundan Lal* (1) ought no any longer to be followed. "In truth," runs the opinion of Lord SHAW, "to give true effect to the doctrine of antecedency in time, there must be also real dissociation in fact." In *Nathu* v. *Kundan Lal* (1) and in the case before us, there is not only no such dissociation in fact, but there is the most intimate association. In the previous decision of this Court, reliance was placed in the judgment upon the fact that the condition of the decree had been actually complied with and the property had been acquired as the result of the money borrowed in the mortgage transaction which was in question. That seems to me to be exactly the vice against which the Privy Council have warned the courts of India. On the other hand, it seems to me that the decision in *Kapildeo* v. *Thakur Prasad* (2) marks very clearly the other side of the dividing line, there being in that case an obligation incurred antecedent in time and dissociated in fact, either to take up the purchase at auction or to pay compensation for default.

Case remitted for further evidence.

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February, 21.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Gokul Prasad.

MAJHABU PRASAD (DEFENDANT) v. MUSAMMAT PARSANDI (PLAINTIFF).*

Landlord and tenant—Rent paid to person not entitled to realize it. Suit by rightful owner to recover rent so realized—"Money had and received"—Limitation.

Defendant, acting as guardian of a minor, sued for and realized certain rents which in law were payable to plaintiff.

Held, on suit by plaintiff to recover the rents so realized, that the suit was one for money had and received to the use of the plaintiff, in respect of which limitation ran from the date of realization, and the plaintiff was entitled to recover notwithstanding that, if she herself had sued at the time the defendant's suit was filed, her claim would have been barred by limitation. *Sundar Lal* v. *Fakir Chand* (3), *Mahomed Wahib* v. *Mahomed Ameer* (4) and *Afzal Shah* v. *Muhammad Abdul Karim* (5), referred to.

THE facts of this case are fully stated in the judgment of the Court.

Dr. *Kailas Nath Katju* and Mr. *S. A. Haidar*, for the appellant.

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* Second Appeal No. 1602 of 1921, from a decree of H. J. Collister, Additional Judge of Meerut, dated the 12th of July, 1921, confirming a decree of Ghanshyam Das, Munsif of Muzaffarnagar, dated the 31st of July, 1920.

(1) (1916) I. L. R., 38 All., 242
(2) (1913) I. L. R., 35 All., 17.
(3) (1902) I. L. R., 25 All., 62
(4) (1905) I. L. R., 32 Calc., 527.
(5) (1915) I. L. R., 37 All., 232.

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MAHABIR PRASAD v. MUSAMMAT PARSANDI

Munshi *Panna Lal*, for the respondent.

BANERJI and GOKUL PRASAD, JJ. :—The facts which have given rise to this appeal are shortly as follows One Musammat Badamo was the original owner of this property She made a gift of it to her daughter's son Roshan Lal who was, at that time, a minor. Her property was being managed by her son-in-law Fakir Chand, who continued to do the same for his minor son Roshan Lal, the donee Roshan Lal died in 1909 and was succeeded by his widow Musammat Parsandi, the present plaintiff. On the 22nd of June, 1911, Musammat Parsandi made a gift of the said share to her daughter Musammat Ratan Mati. It seems that there was some litigation about this shop between Musammat Ratan Mati aforesaid and some other persons who claimed the property as the heirs of Fakir Chand mentioned above. This led to a suit which was brought in the year 1914 by Musammat Ratan Mati for a declaration of her title against the present defendant Mahabir Prasad, and the other persons who laid claim to the estate of Fakir Chand. The present defendant Mahabir Prasad is a son of Fakir Chand by a wife other than the daughter of Musammat Badamo. This suit for a declaration of Ratan Mati's title was decreed by the first court on the 8th of March 1915. The defendants went up in appeal and the learned Judge of the lower appellate court dismissed the suit, holding that it was barred by section 42 of the Specific Relief Act The then plaintiff went up in second appeal and this Court by its order of the 4th of June, 1918, held that the suit was not so barred and remanded it to the lower appellate court for disposal according to law This suit of Musammat Ratan Mati was eventually decreed by the lower appellate court against all the defendants; in other words, it was held that she was the owner of the share in dispute by virtue of the gift made in her favour by Musammat Parsandi. This was on the 12th of April, 1919.

In the meanwhile, soon after the aforementioned suit had been dismissed by the lower appellate court as barred by section 42 of the Specific Relief Act, the present defendant Mahabir Prasad brought a suit on the 29th of May, 1916, against Moti Lal, the tenant of the shop, for recovery of rent for the period between the 8th of October, 1906, and the 25th of May, 1916. The suit was based on a *kirayanama* executed by Moti Lal aforesaid in favour of Fakir Chand, the father of Mahabir Prasad. This suit was decreed by the first court on the 21st of December, 1916, and the decree of the first court

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was affirmed by the lower appellate court in 1917. Moti Lal deposited the decretal amount on the 4th of August, 1917, and it was withdrawn by the present defendant on the 31st of July, 1919, that is, about three months after the decision of the question of title in favour of Musammat Ratan Mati. The present suit was then brought on the 9th of February, 1920, by Musammat Parsandi for recovery of the amount so realized by Mahabir Prasad, namely, rent for the period between the 8th of April, 1908, and the 21st of June, 1911, that is, for a period little over three years before the date of her gift to Ratan Mati. The defence put forward by Mahabir Prasad was that the property having been gifted in favour of Ratan Mati, the plaintiff had no right to sue. No other questions were raised in the first court. The first court decreed the claim. The defendant Mahabir Prasad then went up in appeal and raised the further defence that the suit was barred by limitation. This was based on the ground that at the time when Mahabir Prasad brought the suit, any claim by Musammat Parsandi for recovery of the same amount of arrears would have been barred by time. The learned Judge of the lower appellate court has repelled this contention and affirmed the decree of the court of first instance, holding on the question of title in favour of the plaintiff just as the first court had done.

The defendant comes here in second appeal, and the first question argued on his behalf was that the present suit was barred by limitation. The present suit being one to recover moneys realized by the defendant on the 31st of July, 1919, to which the plaintiff was entitled as owner of the property, and having been brought within three years of the date of such realization is not *primâ facie* barred by time; but the argument advanced by the learned advocate for the appellant is that this money was not realized by the defendant for the plaintiff's use, because on that day the plaintiff's claim to this money was barred by time.

The real question which we have to decide in this case is, who was entitled in fact and in law to the rent for the period in dispute. There can be no doubt that this money was payable to Musammat Parasandi, she having been the owner during the period for which the rent was claimed. The defendant could only be deemed to have realized this money for the plaintiff. Fakir Chand, the father of the defendant, was the manager of the property for his mother-in-law, Musammat Badamo, and, subsequently, for his son Roshan Lal. As Badamo had gifted

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the property to Roshan Lal who was then a minor. Fakir Chand must be deemed to have been acting for him and, after him, for his widow and to have obtained the rent-deed as their agent. This case is similar to the case of a *benamidar* getting a decree for money really due to the beneficial owner. In such a case it has been held that the money which the *benamidar* realizes under the decree in his favour is money had and received for the beneficial owners of the house. [See *Sundar Lal* v. *Fakir Chand* (1).] The principle of the ruling in *Mahomed Wahib* v *Mahomed Ameer* (2) also applies to the present case. That case was approved of in *Afzal Shah* v. *Muhammad Abdul Karim* (3). The mere fact that the defendant could recover rent for a longer period by reason of his minority does not affect the present question. No doubt the money could not have been realized for the full period now claimed if the suit had been brought by Musammat Parvandi. But since the defendant chose to bring a suit for rent which was in reality payable to the plaintiff and he could obtain a decree for that rent by reason of his minority, that does not disentitle the plaintiff from getting the money which has in fact been received by the defendant for the use of the plaintiff.

We, therefore, think that the decree of the court below was right and dismiss this appeal with costs.

Appeal dismissed.

PRIVY COUNCIL.

P. C.* 1923 *May*, 10

BALGOBIND, SINCE DECEASED AND OTHERS (PLAINTIFFS) v. BAIJU PRASAD AND ANOTHER (DEFENDANTS).

[On Appeal from the Court of the Judicial Commissioner of Oudh.]

Hindu law—Inheritance—Custom—Exclusion of daughters—Wajib-ul-arz.

The *wajib-ul-arz* applicable to a village in Oudh stated: "The rule of inheritance and division in this village is that on the death of a co-sharer his sons become owners of his share in equal shares, and the daughter does not get any share by inheritance." Upon an issue whether there was a custom excluding daughters from inheritance in the absence of sons, and in the presence of the sole surviving brother of the last holder:

Held that upon the true construction of the *wajib-ul-arz* a daughter was not entitled to a share by inheritance in any circumstances, and that the *wajib-ul-arz*, being unambiguous, was sufficient to establish the custom.

* *Present*:—Lord BUCKMASTER, Lord DUNEDIN, Lord CARSON, Sir JOHN EDGE and Lord SALVESEN.

(1) (1902) I. L. R., 25 All., 62.

(2) (1905) I. L. R., 32 Calc., 327.

(3) (1915) I. L. R., 37 All., 232.

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Quære how the custom would operate in the absence of any relation of the last holder.

Observations as to the value of an unambiguous statement of a custom in a *wajib-ul-arz*.

APPEAL (No. 19 of 1922) from a judgment and decree of the Court of the Judicial Commissioner of Oudh (July 15, 1919,) reversing a decree of the Subordinate Judge of Gonda.

The only question upon the appeal was whether the deceased appellant (the plaintiff) had established a custom applicable to a village in Oudh, named Aunian Durga, whereby daughters and their issue were excluded from inheritance as against himself, the sole surviving brother of the last holder.

The facts appear from the judgment of the Judicial Committee. The Subordinate Judge held that the custom alleged was established by the oral evidence and by a wajib-ul-arz, the material part of which appears in the judgment. The Court of the Judicial Commissioner reversed that decision and dismissed the suit; the learned Judges considered that the wajib-ul-arz, though applicable to the village in suit, was ambiguous and the evidence unsatisfactory.

1923, *April*, 29. *De Gruyther*, K. C., and *Dube* for the appellants relied on oral evidence and the wajib-ul-arz, and referred to *Shcomangal* v. *Jagpal Singh* (1).

Kenworthy Brown and *Hyams* for the respondents referred to *Parbati Kunwar* v *Chandarpal Kunwar* (2), and *Anant Singh* v. *Durga Singh* (3); they contended that the wajib-ul-arz was ambiguous and should not be acted upon in the absence of proof of instances, especially having regard to the facts (1) that the suit was for ejectment, (2) that the custom varied the ordinary law.

Dube replied.

May, 10. The judgment of their Lordships was delivered by Sir JOHN EDGE :—

This is an appeal from a decree of the Court of the Judicial Commissioner of Oudh, which reversed a decree of the Subordinate Judge of Gonda, and dismissed the suit. The suit was a suit for the possession of the village Aunian Durga in the district of Gonda, and for mesne profits, and it depended on whether there was or was not a family custom in the village by which daughters and their issue were excluded from inheritance. The Subordinate Judge found that there was such a

(1) (1908) 12 Oudh Cases, 63, 69.
(2) (1909) I. L. R., 31 All., 457, 475; L. R., 36 I. A., 125, 136.
(3) (1910) I. L. R., 32 All., 369, 378; L. R., 37 I. A., 191, 197.

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custom and decreed the suit The Court of the Judicial Commissioner on appeal found that the custom was not proved, and accordingly dismissed the suit.

In order to understand how this question as to a custom excluding daughters and their issue from inheritance has arisen in this suit, it is necessary to refer briefly to the family to which the plaintiff, Balgobind Pande, had belonged Balgobind Pande and his three elder brothers, Sital Prasad Pande, Radha Pande and Raghubar Pande, had, with their father, Narain Dat Pande constituted a joint Hindu family which was governed by the law of the Mitakshara subject to any lawful variation of that law by custom. A lawful variation of that law would be a custom which excluded daughters and their issue from inheritance Such a custom is not uncommon in Oudh and in other parts of India.

The elder brother of Narain Dat Pande was Harnarain Pande, who was a sanad holder, and was possessed of considerable immovable property in Oudh Harnarain Pande gave some of his villages to Narain Dat Pande absolutely Narain Dat Pande also acquired other villages, one of which was the village Binduli Their Lordships do not know when Narain Dat Pande died At the settlement in Oudh after the Mutiny, the villages which Narain Dat Pande had self-acquired and those which he had acquired by gift from his elder brother were by courtesy described as taluqa Binduli, and the property was in the settlement papers referred to as a taluqa It is not necessary to consider whether that property was or was not correctly described as a taluqa

Sital Prasad Pande was at the time of the settlement the manager on behalf of the then joint family, and he was also the lambardar of some, if not of all, the villages included in the taluqa

The Settlement Officer prepared a wajib-ul-arz for each of the villages The fourth paragraph of the wajib-ul-arz of Binduli as translated by the official translator is as follows :— "Para 4 — Rights of transfer and inheritance —Each of the two co-sharers has the right to transfer his share; but so long as one of them is willing to purchase, the other shall not sell to a stranger. The rule of inheritance and division (thereof) in this village is that on the death of a co-sharer his sons become owners of his share in equal shares and the daughter does not get any share by inheritance. If a co-sharer has several wives, of whom one has one son and the other several, then on the

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death of the co-sharer his share will be divided equally among his sons. There is no custom of *Shibhag* (division according to number of wives). When one wife has sons and another has daughters only, then such other will not get a share. The issue of the (former) wife will possess the share and maintain (in food and clothing) the daughters and bear the expenses of their marriage. If there is no male issue born of the wives, they will remain in possession in equal shares. The widows have no power to adopt; on (their) death the nearest relation of the husband succeeds to the share. An unmarried wife and her children are given maintenance: they do not get (inherit) a share."

The vernacular words of the sentence which the official translator has translated as "The rule of inheritance and division (thereof) in this village is that on the death of a co-sharer his sons become owners of his share in equal shares, and the daughter does not get any share by inheritance," given, presumably correctly, by the learned Judicial Commissioners in their judgment, do not include between the words "equal shares" and the words "the daughter" any word which could be translated as "and." Their Lordships do not consider it necessary to refer this case back to the Court of the Judicial Commissioner for a report as to whether a word representing "and" is or is not in the original wajib-ul-arz between the words "equal shares" and the words "the daughter," as in either event the sentence, in their Lordships' opinion, would have the same meaning; that is, that a daughter and her issue are excluded from a right of inheritance. Paragraph 4 of the wajib-ul-arz of Binduli is not repeated in the wajib-ul-arz of Aunian Durga as the villages of the settlement were treated as villages of the taluqa Binduli, having a common custom as to rights of inheritance, but reference as to the customs of Aunian Durga is made to paragraph 4 of the wajib-ul-arz of Binduli. Sital Prasad Pande signed the wajib-ul-arz of the village of Binduli, and verified before the Settlement Officer the wajib-ul-arz of Aunian Durga, and no exception was taken by anyone to the record of the custom.

After the settlement the brothers separated and the village Aunian Durga fell to the share of the second brother, Radha Pande. Radha Pande married Musammat Janka, but whether the marriage took place before the settlement or afterwards their Lordships do not know. Radha Pande had by his wife

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a daughter, Musammat Thakur Dei, but no son. Musammat Thakur Dei married and had a son, Badri Prasad, who is defendant 1. Radha Pande died in 1901, and on his death Musammat Janka came into the possession of Aunian Durga for the interest of a Hindu widow. On the 4th of April, 1902, Musammat Janka granted a perpetual lease of 80 bighas of Aunian Durga to Tibhawan Tewari and Baleshar Tewari, the defendants 4 and 5, and on the 1st of May, 1902, mortgaged with possession an undivided moiety of the village to the predecessors in title of defendant 3. On the 31st of October, 1916, Musammat Janka made a gift of a 6-anna share in Aunian Durga to Gajadhar Prasad, defendant 2. On the 3rd of November, 1916, Musammat Janka and her daughter Musammat Thakur Dei gave all such rights and interest as they possessed in the remaining 10-annas share of Aunian Durga to Badri Prasad, defendant 1. On the 4th of March, 1917, Musammat Janka died. On her death the plaintiff Balgobind Pande was the next reversioner to her husband, Radha Pande; Sital Prasad Pande and Raghubar Pande being then dead. On the 24th of August, 1917, Balgobind Pande gave an 8-annas share in Aunian Durga to Kesho Dat Ram Pande and Tikam Dat Ram Pande, who were grandsons of Sital Prasad Pande, being the sons of his son, Mahadeo Prasad, who was then dead. On the 7th of September, 1917, Balgobind Pande, Kesho Dat Ram Pande and Tikam Dat Ram Pande brought this suit. Balgobind Pande is now dead, and is represented in this appeal by his sons, Suraj Dat and Jagdish Dat, a minor through his guardian.

It is not proved or contended that any of the alienations already mentioned by Musammat Janka were made for necessity, and the only question which it is necessary for their Lordships to consider is whether by custom daughters and their issue are excluded from inheritance in Aunian Durga. As has been already stated, the learned Subordinate Judge who tried the suit found that that custom was proved. The learned Judicial Commissioners who heard the appeal apparently did not doubt that the entry of the custom in the wajib-ul-arz of the village Binduli was evidence of the custom which governed the right to inherit in the village Aunian Durga, but they were of opinion that paragraph 4 of the wajib-ul-arz of Binduli was ambiguous and that owing to that ambiguity the custom was not proved. It is quite true that a custom is not established by an ambiguous statement of it in a wajib-ul-arz.

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In their Lordships' opinion there is no ambiguity in the statement as to the custom. The only construction to which it is open is in their Lordships' opinion that on the death of an owner of the village no daughter of his is under any circumstances entitled to a share in the property by right of inheritance, whether he had left sons or not. How such a custom would operate in cases in which an owner died leaving no relation but a daughter who could inherit it is not necessary now to consider. If a daughter had no right to inherit her issue could not inherit. The provision that on the death of a co-sharer his sons became owners of his share in equal shares was probably inserted to exclude any claim under a custom of primogeniture which is not an uncommon custom in Oudh.

Settlement Officers in recording customs in wajib-ul-arzes have to perform duties which the Government orders them to perform.

One of these duties was to record customs as the Settlement Officer found them, and not as he might think they ought to be. When it is not shown by reliable evidence that the Settlement Officer neglected to perform his duty or was misled in recording a custom, and it does not appear that the statement of the custom is ambiguous, the record in a wajib-ul-arz of a custom is most valuable evidence of the custom, much more reliable evidence than subsequent oral evidence given after a dispute as to the custom has arisen.

There was no evidence to prove or even to suggest that the Settlement Officer in stating the custom as he did in the wajib-ul-arz had in any way neglected his duty in ascertaining what the custom was, or was misled as to the custom; nor was there any evidence given in this suit in denial of or at variance with the custom.

Their Lordships find that the custom excluding daughters and their issue from inheritance was proved, and they will accordingly humbly advise His Majesty that this appeal should be allowed with costs, that the decree of the Court of the Judicial Commissioner should be set aside with costs, and that the decree of the Subordinate Judge should be restored and affirmed.

Solicitor for appellant's representatives: *E. Dalgado.*

Solicitors for respondents: *Barrow, Rogers, and Nevill.*

Appeal allowed.

P. C.* 1923 *May*, 15.

MUHAMMAD MUMTAZ ALI KHAN (DEFENDANT) *v.* MOHAN SINGH (PLAINTIFF)

(Consolidated appeals)

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Oudh under-proprietary right—Limitation—Adverse possession—Cancellation of notices of ejectment—Oudh Rent Act (XXII of 1886), section 105 — Continuance of possession—Indian Limitation Act (IX of 1908), section 28.

In 1893 the respondent obtained a decision of the Revenue Court under section 105 of the Oudh Rent Act, 1886, cancelling a notice of ejectment served on him by the appellant under sections 53, 54 of that Act, the Court holding that there was reasonable ground for supposing that the respondent was an under-proprietor and therefore not a tenant liable to ejectment under the Act. Subsequently he remained in possession, making to the appellant the same payment in respect of the land as formerly. In 1913 he sued for a declaration that he was an under-proprietor.

Held that the respondent's unfounded assertion in 1893 of an under-proprietary right did not by lapse of time convert him into an under-proprietor, his possession was not adverse, and section 28 of the Indian Limitation Act, 1908, did not apply as the appellant could not sue for possession.

CONSOLIDATED Appeal (No. 110 of 1921) by special leave from a judgment and decree of the Court of the Judicial Commissioner (July 30, 1915,) affirming decrees of the District Judge of Gonda, which affirmed decrees of the Munsif of Utraula.

The consolidated appeal arose out of suits instituted by the respondents in 1913 against the appellant, each praying for a declaration that the plaintiff was the under-proprietor of land in Oudh of which he was in possession. The plaints in each case alleged that after a cancellation of a notice of ejectment in 1893 the plaintiff had continued in possession for more than 12 years on a basis of under-proprietary rights, and the defendant (the taluqdar) had not sued for a declaration that the plaintiff's right was merely that of a simple tenant. The facts appear from the judgment of the Judicial Committee.

The Trial Judge, the Munsif, held that the respondents originally were not under-proprietors, but that they had become so by prescription or limitation; he made declarations as prayed. The decrees were subsequently affirmed on appeal by the District Court, and by the Court of the Judicial Commissioner.

1923, *April*, 23. *De Gruyther*, K. C., and *Parikh* for the appellant. The respondents were not in fact under-proprietors. The wajib-ul-arz of the village states expressly that there were no under-proprietors in the village; that was a point with which the wajib-ul-arz had to deal: see Circular 20 of 1863.

* *Present*:—Lord BUCKMASTER, Lord DUNEDIN, Lord CARSON, Sir JOHN EDGE and Lord SALVESEN.

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paragraphs 1, 12; Circular 21 of 1863. The decision of 1893 was merely that a *prima facie* case had been made out. The subsequent possession was not adverse; the same payment continued to be made to the talukdar, and there was no further assertion of the alleged right. In any case the plaintiff did not obtain a title under section 28 of the Limitation Act, because the appellant could not sue for possession. The Munsif relied on *Har Dayal* v. *Udit Narain Singh* (1), but that case was wrongly decided. If any article of the Limitation Act applies it is article 120, and that bars the plaintiffs' suits. The decision of the Board in *Pirthipal Singh* v. *Ganesh Din Singh* (2) is not applicable to the facts of this case.

The respondents did not appear.

May, 15. The judgment of their Lordships was delivered by Lord SALVESEN:—

The appellant in these two appeals which have been consolidated was the defendant in a separate suit brought by each plaintiff (respondent) for a declaration to the effect that he was an under-proprietor of certain land situated in the village of Badhia Farid. This village forms part of the estate called the Bilaspur estate in the Gonda district of Oudh. The Munsif's Court granted to each plaintiff a declaratory decree in terms of the plaintiffs' prayer; these decrees were affirmed in appeal and the defendant obtained special leave to appeal to His Majesty in Council. There is no distinction between the two cases so far as the points in controversy are concerned and they may, therefore, be treated as one.

There has, unfortunately, been a considerable amount of litigation between the defendant and the plaintiffs who have the use or occupation of the land described. As far back as the year 1891 the defendant issued notices of ejectment under sections 54 and 55 of the Oudh Rent Act, 1886 (Act XXII of 1886), against the two plaintiffs or their predecessors in the title. They thereupon instituted proceedings under section 108 (8) of this Act to contest the said notices on the ground that they were not tenants liable to ejection by notice under the Act but were under-proprietors thereunder. In these proceedings, final judgment was pronounced on the 17th of March, 1893, by the Board of Revenue in N.-W. P. and Oudh. The operative part of the judgment was that the notice of ejectment issued by the defendant be cancelled and the objections of the

(1) (1904) 8 Oudh Cases, 30.

(2) P. C. Appeal No. 123 of 1921, judgment delivered October, 31, 1923.

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plaintiffs be allowed. The ground of the decision, to put it shortly, was that when in answer to a notice of ejectment an occupier pleads that he has an under-proprietary right in his holding, it is sufficient for him to satisfy the Board of Revenue that there is reasonable ground for presuming that he is not an ordinary statutory tenant under the Rent Act in order to obtain cancellation of the notice.

It is plain from the considered judgment of the Board of Revenue that they were of opinion that a *prima facie* case had been made out by the plaintiffs. The judgment was based on previous proceedings which had taken place between the defendant and certain persons in occupation of the land in question in whose right the present plaintiffs now are. In 1871 these persons had claimed in the Settlement Courts sub-settlement of the village. Their claim was rejected, but in rejecting it the Settlement Court of first instance gave them a proprietary decree in respect of "*sir*." This decree was appealed to the Commissioner's Court by which the decree was wholly set aside; not, however, on the merits of the title to settlement or to "*sir*" but on a technical ground. The case was sent back for trial, but prosecution of it was dropped by the parties and no decision in favour of either was passed, but the fact that the Settlement Court of first instance had pronounced a decree in favour of the plaintiffs was held sufficient justification for cancelling the notice of ejectment, leaving the parties to constitute their claims, if they so desired, in the proper Civil Court.

No enquiry seems to have been made in this suit as to the state of the title so far as depending upon written evidence, nor as to the point which was brought before their Lordships in argument in the present case, that under-proprietors who failed to get a decree in their favour in the Settlement Court prior to a given date must be presumed to have abandoned or lost any rights which they might previously have possessed. This is scarcely to be wondered at, in view of the fact that while the Revenue Court was the only one which was competent to deal with a notice of ejectment it had no jurisdiction to determine proprietary rights.

After the decree of cancellation of the notice of ejectment, both parties remained quiescent until 1905, when the defendant instituted a suit against the plaintiffs in the Court of the Munsif of Utraula, alleging that they were merely tenants, and claimed possession of the lands in their occupation. The plaintiffs

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resisted the suit, but on the 20th of September, 1905, the Munsif granted a decree in favour of the present appellant. An appeal was taken to the Court of the Judicial Commissioner of Oudh, which on the 8th of August, 1906, held that the suit, being for recovery of possession, would not lie in a Civil Court and dismissed the same. Thus proceeding need not be further referred to beyond showing that the defendant then maintained the same position as he took up when he served notices of ejectment upon the plaintiffs.

In 1910, the tenants fell into arrears of the money payment (to use a neutral term) which they had hitherto been making in respect of the lands in question, and the defendant sued them in the Rent Court for arrears of rent, claiming interest thereon under section 141 of the Oudh Rent Act. It may be noted that one of the differences between an under-proprietor and an occupancy tenant having a more or less fixed tenure is, that the former is not liable to pay interest on arrears of rent. The plaintiffs in the present case took this point and contested their liability to pay interest. On the 31st of May, 1910, however, the Rent Court held that the plaintiffs were not under-proprietors, and treating them as tenants, allowed the claim for interest and decreed the suit.

The decision in this case led to the institution of the present suits which were brought in the beginning of 1913 in the Court of the Munsif of Utraula. In his petition of plaint each plaintiff narrated the previous proceedings and prayed that a declaratory decree be passed in his favour to the effect that he was under-proprietor of the lands which he occupied in the village of Badhna Farid. He maintained his suit upon two grounds—first, that he and his ancestors had been throughout under-proprietors and as such had been in possession of the lands for many years; and second, even if he failed to establish this, that he had continued in possession for more than twelve years after the date of the decree cancelling the notice of ejectment and had thus by prescription acquired under-proprietary rights.

The only issue in the suit was: Is the plaintiff under-proprietor of the plots in suit? The Munsif decided that the plaintiff had no under-proprietary rights but that he had become under-proprietor by prescriptive possession; he, therefore, decreed the suit with costs. The defendant appealed to the Court of the District Judge of Gonda, who agreed with the

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court below and dismissed the appeal. The defendant next appealed to the Court of the Judicial Commissioner of Oudh, who affirmed the judgment on the same grounds and dismissed the appeal.

As all these courts were of opinion that each plaintiff had failed to establish the under-proprietary rights which he claimed, and as no appeal has been taken on behalf of either, and he has not appealed before the Board in the present appeal, it is not necessary to consider the grounds upon which the learned Judges reached a result on which they were all agreed. That this result was amply warranted appears, however, from the only document of title that has been produced in the case. That document is the wajib-ul-arz of the village of Badhia Fand, the date of which is stated to be approximately 1873. An extract from this document contains the following "Paragraph 12 relating to under-proprietary rights" and states categorically "In this village there is no under-proprietor." In view of this document and in the absence of anything evidencing proprietary rights in favour of the plaintiff the Board think that there cannot be any doubt as to the correctness of the decision arrived at under this heading by the courts below. This becomes all the clearer when the history and terms of the Oudh Settlement Acts are examined. If this document had been produced in 1893 when the defendant sought and obtained the cancellation of the ejectment notice it may well be that the Revenue Board would not have reached the conclusion which they did that there was *prima facie* evidence on which they were entitled to maintain the state of possession until the rights of the parties had been declared in a competent court.

There remains, however, the other question on which the courts below have decided against the defendant. The essential ground of judgment is contained in a single sentence of the judgment of the Judicial Commissioner where he says, "There has been continuous possession of the land in the assertion of an under-proprietary right which is adverse to the landlord's proprietary title and I agree, therefore, with the lower court that these plaintiffs have a good title by prescription."

The assertion relied on is, of course, that contained in the proceedings for the cancellation of the notice of ejectment in 1893, and as there has been no judicial challenge of this assertion by the landlord within twelve years from the date when it

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was made, it is immaterial to consider from what date prescription would run, and whether the period of limitation applicable be twelve or six years.

The Board are unable to hold that the simple assertion of a proprietary right in a judicial proceeding connected with the land in dispute which *ex hypothesi* was unfounded at the date when it was made, can, by the mere lapse of six or twelve years, convert what was an occupancy or tenant title into that of an under-proprietor. It is true that the defendant might, if he had chosen, have at once instituted proceedings for a declaratory decree that the plaintiff was not an under-proprietor, but such a course was equally open to the plaintiff. Each party had had his supposed rights judicially challenged by the other, the plaintiff by the notice of ejectment, of which he had obtained cancellation, the defendant by the assertion in the proceedings for cancellation of the notice for ejectment that he was not liable to be ejected because of his rights as under-proprietor. The Board, however, do not consider that it was the duty of either party to institute such a suit if they were content that possession should remain on the same footing as before the notice of ejectment was served. They are unable to affirm as a general proposition of law that a person who is, in fact, in possession of land under a tenancy or occupancy title can, by a mere assertion in a judicial proceeding and the lapse of six or twelve years without that assertion having been successfully challenged, obtain a title as an under-proprietor to the lands. Such a judgment might have very far-reaching results and would almost certainly lead to a flood of litigation. It is notorious that in actions for rent or enhancement of rent or for ejectment the persons in possession are prone to maintain rights which they do not possess, and if for any reason, as in the present case, no judicial determination is arrived at but the parties continue on the original footing, the mere lapse of so short a period as six or twelve years (which might be amply explained upon other grounds) would deprive the landlord of his proprietary rights unless in the meantime he had brought a declaratory suit to settle once and for all the terms on which possession was held. The case might have been different if, in addition to the judicial assertion by the plaintiff there had been any change in the money payment which he thereafter made to his landlord. There is, however, no suggestion that the same money payment which had been made before the

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notice of ejectment was not continued thereafter. The possession by the plaintiff, therefore, remained on precisely the same footing as at the time when he was held by the court to have merely an occupancy title, the precise nature of which it is not necessary to consider in this case.

Reference was made to the Limitation Act IX of 1908 and especially to section 28 which is as follows :—

"At the determination of the period hereby limited to any person for instituting a suit for possession of any property his right to such property shall be extinguished." This section appears to have no application to this present case, for the appellant through his counsel did not maintain that he could institute a suit for possession of the village in question, or treat the plaintiffs as if they had merely been squatters, and the Board were not referred to and are not aware of any other section which would have the effect of extinguishing a right of property which is vested in one person and transferring it by the mere lapse of time to the person actually in possession.

Special leave to appeal was granted only upon the footing *inter alia* that the directions as to the payment of costs in the court below should not be varied in any event and that the appellant should pay the respondents' costs. Their Lordships will humbly advise His Majesty that the decrees be reversed, except in so far as they deal with the payment of costs, and that the suits be dismissed. As the respondents have not appeared there will be no order as to the costs of the appeals.

Solicitor for appellant : *E. Dalgado*

Decree reversed.

FULL BENCH.

Before Justice Sir Pramada Charan Banerji, Mr. Justice Piggott and Mr. Justice Walsh.

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February, 19

YAD RAM (JUDGMENT-DEBTOR) *v.* SUNDAR SINGH (DECREE-HOLDER).*

Civil Procedure Code, section 115—Revision—Mortgage—Property sold in execution of decree—Interest in property subsequently sold by judgment-debtor—Application by judgment-debtor to set aside the sale rejected in accordance with a ruling of the High Court.

After a sale had taken place in execution of a decree for sale on a mortgage, the judgment-debtor, having sold his interest in the mortgaged property, deposited the amount of the decree plus 5 per cent and applied under order XXI, rule 89, of the Code of Civil Procedure to have the sale set aside. The court of first instance set aside the sale, but on appeal this decision was reversed and the application dismissed in accordance

* Civil Revision No. 55 of 1923.

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with the ruling of the High Court in *Ishar Das* v. *Asaf Ali Khan* (1). The judgment-debtor applied in revision to the High Court.

Held by BANERJI and PIGGOTT, JJ., (*Dissentiente* WALSH, J.) that inasmuch as the court below had jurisdiction to decide whether or not the applicant was entitled to apply to have the sale set aside, no revision lay to the High Court. *Basavaraja Udagatti* v. *Gurusiddappa Annaji* (2) *Dhanki Lal* v. *Bisheshar Das* (3) and *Chandu Lal* v. *Kalu Mal* (4) referred to. *Sundaram alias Vythinathan* v. *Manne Marudhan* (5) and *Wasammal Dhanamanti Knar* v. *Shee Shankar Lal* (6) discussed.

Held by PIGGOTT and WALSH, JJ., that the court below might have made a reference to the High Court under order XLVI, rule 1, of the Code of Civil Procedure, as to the doubt that the making of such a reference would have involved the subsequent correction of a ruling of the High Court.

THE facts of this case sufficiently appear from the judgment of BANERJI, J.

Munshi *Gulzari Lal*, for the applicant.

Munshi *Panna Lal*, for the opposite party.

BANERJI, J.—A preliminary objection has been taken to the hearing of this application for revision, on the ground that a revision does not lie under the provisions of section 115 of the Code of Civil Procedure. The circumstances out of which the case arose are these. There was a decree for sale against one Yad Ram, and in execution of that decree the mortgaged property was sold by auction. Subsequently to the auction sale, Yad Ram sold his interests in the property already sold by auction, and after this sale he presented an application to the court under order XXI, rule 89, of the Code of Civil Procedure, depositing the amount of the decree and the 5 per cent. penalty mentioned in the section, and prayed that the sale might be set aside. The court of first instance set aside the sale. An appeal was preferred from the judgment of that court to the lower appellate court under order XLIII, rule 1, clause (*j*). The appellate court set aside the order of the court of first instance, being of opinion that the judgment-debtor, Yad Ram, was not entitled to make the application for setting aside the sale. In so holding the lower appellate court followed the ruling of this Court in *Ishar Das* v. *Asaf Ali Khan* (1). From this decision of the lower appellate court the present application for revision has been presented.

In my judgment, in view of the provisions of section 115 of the Code of Civil Procedure, as interpreted by their Lordships of the Privy Council, and as interpreted by this Court in several

(1) (1911) I. L. R., 34 All., 186.
(2) (1917) I. L. R., 40 Mad., 703.
(3) (1918) I. L. R., 40 All., 612.
(4) (1920) I. L. R., 43 All., 334.
(5) (1921) I. L. R., 44 Mad., 551.
(6) (1919) 4 Patna L. J., 340.

rulings, the application is not maintainable It has been held by their Lordships of the Privy Council in *Balakrishna Udayar* v *Vasudeva Ayyar* (1), that the only question which can be entertained under section 115 is the question of jurisdiction, and that if the court has refused to exercise jurisdiction, or has exercised jurisdiction which is not vested in it by law, or if in the matter of jurisdiction, the court has acted with illegality or with material irregularity, an application for revision is maintainable. This ruling of their Lordships of the Privy Council was considered in the case of *Jhunku Lal* v. *Bisheshar Das* (2) and it was held that unless the court had acted illegally or with material irregularity in relation to the question of jurisdiction, an application for revision could not be maintained. In the present case the court was competent to determine whether Yad Ram was entitled to make an application under order XXI, rule 89, and it had jurisdiction to decide that question, and it decided it adversely to Yad Ram. The court may have been wrong in its decision, but it cannot be said that in the exercise of its jurisdiction it acted illegally or with material irregularity in the sense in which those words have been interpreted by their Lordships of the Privy Council in the case to which I have referred and in earlier cases decided by their Lordships As was pointed out in the case of *Chandu Lal* v. *Koka Mal* (3), the course of rulings in this Court has since 1886 been that an application for revision in similar circumstances does not lie I see no reason to alter the view which I have expressed in earlier cases and, with great respect, I am not prepared to accept the contrary view held in the cases of *Sundaram* alias *Muthreenbini* v. *Mausa Maruthar* (3) and *Musammat Dhanwanti Kuer* v *Sheo Shankar Lal* (5). I would, therefore, allow the preliminary objection and dismiss this application

PIGGOTT, J.—I am free to admit that, when faced with the contrary view expressed by two other High Courts in the cases just referred to above, and more particularly with the carefully reasoned judgment of the learned Judges of the Patna High Court in a case which is absolutely undistinguishable from the present on the facts, I felt some difficulty in arriving

(1) (1917) I. L. R., 40 Mad., 793
(2) (1918) I. L. R., 40 All., 612
(3) (1920) I. L. R., 43 All., 334.
(4) (1921) I. L. R., 44 Mad., 554
(5) (1919) 4 Patna L. J., 340.

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at a conclusion. What impresses me most, however, is that, in the case now before us, the learned Subordinate Judge was following a decision of a Bench of this High Court, to be found in the Indian Law Reports. He had to determine the question whether one Yad Ram, who had presented a certain application before the court of the Munsif of Aligarh, was or was not a person either owning certain property, or holding an interest therein by virtue of a title acquired before a certain date. The facts required to be examined: but they were admitted facts, so that the court below was not called upon to come to any judicial finding concerning them. On the admitted facts, Yad Ram was not the owner of the property or the holder of any interest therein on the date with which the court below was concerned, if the case of *Ishar Das* v. *Asaf Ali Khan* (1) was rightly decided. The court below was faced with a contrary decision by the learned Judges of the Bombay High Court, and our attention has since been drawn to the fact that decisions in the same sense as that of the Bombay High Court, and in a contrary sense to that of this Court, have been pronounced by the High Courts at Madras and at Patna. The learned Subordinate Judge, however, was under an obligation to follow the reported decision of this Court, *vide* the remarks of their Lordships of the Privy Council in *Puttu Lal* v. *Parbati Kunwar* (2). I cannot reconcile it with my judicial conscience to hold that, in thus fulfilling an obligation incumbent upon him as a judicial officer, the learned Subordinate Judge was acting illegally, or with material irregularity, or going outside the jurisdiction conferred upon him by section 104, read with order XLIII of the Code of Civil Procedure. I appreciate the fact that the practical result of taking this view seems to be that this Court will not be able upon an application in revision to reconsider the correctness of any previous pronouncement of a Bench of this Court upon a question of law. I do not know that any practical inconvenience need necessarily follow upon the adoption and enforcement of this view. In the case now before us it would have been undoubtedly open to the learned Subordinate Judge to have referred the somewhat difficult question of law to this Court under order XLVI, rule 1, of the Code of Civil Procedure, and I mention this matter because the suggestion may be of value to subordinate courts before whom this judgment may be produced for reference. For the

(1) (1911) I. L. R., 34 All., 186.
(2) (1915) I. L. R., 37 All., 369.

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reasons stated I concur in the proposed order dismissing this application.

WALSH, J.—I respectfully dissent. I see no answer to the judgment of Mr JUSTICE MULLICK in the case of *Musammat Dhanwanti Kuer* v. *Sheo Shankar Lal* (1). It would appear that if that view is correct, there has been a miscarriage of justice in this case. But I agree with my brother JUSTICE PIGGOTT, that the learned judge might, if he felt any doubt at the back of his mind about the case of *Ishar Das* v *Asaf Ali Khan* (2), have sought refuge in a reference under order XLVI, rule 1. In order, however, to avail himself of that provision, it must be recognized to his credit that it required him to screw up his courage to state in writing that he entertained reasonable doubts as to the correctness of the decision of the High Court. Subordinate Judges must not be too timorous (in this case it has been stated that serious difficulty exists in the lower courts in applying what is understood to be the construction of order XXI, rule 89) in stating their doubts in order to have them either removed or confirmed by final decisions of the High Court.

BY THE COURT.—The order of the Court is that the application is dismissed with costs.

Application dismissed.

APPELLATE CIVIL.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji

1933 *February*, 22.

DWARKA RAM AND OTHERS (PLAINTIFFS) v JHULAI PANDE AND OTHERS (DEFENDANTS) *

Hindu law—Joint Hindu family—Sale of family property only in part supported by legal necessity—Suit to recover property from vendee—Form of decree.

Where property belonging to a joint Hindu family is sold, and the sale is supported by legal necessity in respect of part only of the consideration, the form of decree in a suit by a member of the family, not a party to the sale, to set it aside should be a decree for possession in favour of the plaintiff, subject to his paying to the purchaser so much of the consideration as was required for the necessities of the family.

THIS was an appeal under section 10 of the Letters Patent from a judgment of a single Judge of the Court. The facts of

* Appeal No. 110 of 1931, under section 10 of the Letters Patent.

(1) (1919) 4 Patna L. J., 340.

(2) (1911) I. L. R., 34 All., 166.

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the case are fully set forth in the judgment under appeal, which was as follows :—

"The suit out of which these appeals arise has not been decided on the right lines by the courts below. The facts are these :—Narain Teli had two sons Bhava and Gaya. Bhava had a son called Badri. Gaya had two sons Munni and Babu. Munni and Babu were separate from Badri. Badri died and Munni and Babu succeeded to his property. On the 24th of March, 1906, Munni and Babu transferred by sale certain landed property, half of which they had inherited from Badri and the remaining half of which was ancestral property. They transferred this property to defendants first party for Rs. 1,400. Jai Gobind Singh sued in the exercise of a right of pre-emption. He and defendants first party arrived at a compromise under which the original vendees transferred the property to Jai Gobind Singh for Rs. 1,900 in 1918. Dwarka and Pulhawan, sons of Munni Ram, and Gauri Shankar, son of Babu, instituted the suit out of which these appeals arise against defendants first party, who have now no connection with the property in dispute, and Jai Gobind Singh for possession of the property transferred. They made an allegation, which was not true, that the whole of the property transferred was the ancestral property of their fathers and themselves, who composed a joint family. They questioned the alienation. It has been found by both the courts below that half of the property transferred originally belonged to Badri and was the self-acquired property of Munni and Babu. The trial court partly decreed the suit. The appellate court dismissed it. The plaintiffs come here in second appeal. Both the courts below have fallen into an error. They have treated the matter as a transfer for Rs. 1,000 and considered whether the amount of Rs. 1,000 stated in the deed was or was not taken for legal necessity. The transfer was for Rs. 1,400. It was never decided anywhere that the transfer was for Rs. 1,000, genuine items, and Rs. 400, fictitious items. What happened was that the vendees who had purchased the property for Rs. 1,400 transferred it by an amicable arrangement to Jai Gobind Singh, who allowed a right of pre-emption, for Rs. 1,900, but the consideration must be considered as Rs. 1,400.

I now come to the items. I need not specify them in great detail. The first item is Rs. 450, money due from Badri; in satisfaction of that debt half the property acquired from Badri was sold. This leaves a balance of Rs. 950. It is made up as follows :—

Rs. 160, Rs. 225, Rs. 65, Rs. 200, Rs. 90, Rs. 75 and Rs. 135 = Rs. 950.

The lower appellate court has found that the items Rs. 160, Rs. 225, and Rs. 65 were taken for legal necessity. It found that the item of Rs. 200 was not taken for legal necessity. It arrived at no finding with respect to the items of Rs. 90, Rs. 75 and Rs. 135. It was open to the appellants when they instituted this appeal to object to the accuracy of the conclusions with regard to the items of Rs. 160, Rs. 225 and Rs. 65 and to demand a decision with respect to the items of Rs. 90, Rs. 75 and Rs. 135. The item which was found in their favour was the item of Rs. 200.

There are their grounds of appeal :

(1) Because the court below is wrong in holding that the property of Badri in the hands of the plaintiffs' fathers has assumed the character of self-acquired property to which the plaintiffs have no claim.

(2) Because part of the sale consideration being admittedly neither for legal nor family necessity, the sale in question ought to have been set aside.

(3) Because the sale in question is liable to be set aside because of inadequacy of consideration.

It will be seen that they nowhere question the decision that the items Rs. 160, Rs. 225 and Rs. 65 were for legal necessity or ask for a finding as to whether the items Rs. 90, Rs. 75 and Rs. 135 were for legal necessity. They clearly take their stand on the ground that, as the lower appellate court has found that Rs. 200 were not for legal necessity, the sale should be

set aside I mention this point, as there was a little confusion in arguments. The grounds of appeal were framed by one learned counsel and the appeal was argued by another I have not been able to entertain arguments except on the grounds of appeal, as no application has been made to add further grounds I now take these grounds of appeal in order It is quite clear that half the property transferred was property which was inherited by Munni and Babu from Badri It was their self-acquired property No suggestion was made in either of the courts below that this property had been amalgamated with the other property of the joint family so as to become joint family property The plaintiffs in their plaint made an untrue assertion that all the property was ancestral property There is nothing to support this plea The half share would ordinarily remain self-acquired property and the circumstance that Munni and Babu transferred it supports the presumption that they treated it as self-acquired property With regard to the second ground I take the same view which was taken by TUDBALL, J., in *Chattu v Chote* (10 Indian Cases, page 269) I see no reason to set aside the sale because Rs 200 were found not to have been taken for family necessity The appellants having raised no objection in respect of the other items, I find that they must stand, not having been challenged

With regard to the third ground there is nothing to support the view that the sale consideration was inadequate The point was raised in the plaint but was not pressed afterwards No issue was framed upon it There is no evidence to support it

As a result I allow the appeal to the following extent. The sale remains good as to the property which formerly belonged to Badri, that is to say, with regard to one half of the property The defendant Jai Gobind Singh will remain in possession of the remainder of the property on condition of his paying Rs 260 to the plaintiffs appellants within six months from the date of this decree Should he not pay Rs 200 to the appellants within six months from the date of this decree, the appellants will be entitled to recover possession of one half of the property on having to Jai Gobind Singh Rs 750 The appellants will pay 6/7ths of their own costs and those of the respondents and the respondents will pay 1/7th of their own costs and those of the appellants in all courts."

Munshi *Shiva Prasad Sinha*, for the appellants

Munshi *Harnandan Prasad*, for the respondents

MEARS, C. J., and BANERJI, J.:—This was a suit brought by the son of a vendor who sold certain property for Rs. 1,400 A claim for pre-emption was put forward in regard to this property and the property was pre-empted by the defendant Jai Gobind Singh The court below has found that half of the property sold by the plaintiff's father was non-ancestral property and the claim has therefore been dismissed as regards that half As regards the remaining half the learned Judge of this Court has made a decree to the effect that Jai Gobind Singh should pay to the plaintiff Rs 200 which was found not to have formed valid consideration for the sale inasmuch as it was not required for family necessity. According to the finding, Rs. 1,200 out of the Rs 1,400 was for family necessity. Therefore, out of the consideration for half the property Rs 600 was required for family necessity and is to be deemed to be valid consideration for the sale As, however, a part of the consideration was not valid the plaintiff would be entitled to a decree

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for possession subject to his reimbursing to the purchaser the amount in respect of which the sale was a valid sale. If any part of the consideration was invalid and not binding on the plaintiff, the plaintiff would be entitled to have the sale set aside. But if a portion of the consideration was good and binding on the plaintiff, he would be entitled to reimburse it to the defendant. The form of the decree in a case of this kind should, therefore, be a decree for possession in favour of the plaintiff, subject to his paying to the purchaser so much of the consideration as was required for the necessities of the family. Thus is the form of the decree in a suit of this kind which has always been maintained. In the present case the plaintiff is entitled to a decree for half of the property on condition of his paying Rs. 600 which, as we have said above, was required for family necessity in respect of half the property. We, therefore, vary the decree of this Court and make a decree in the plaintiff's favour for possession of the property claimed by him, on condition that he pays to Jai Gobind Singh defendant Rs. 600 within six months from this date, otherwise the claim will stand dismissed with costs. The appellant will have his costs of this appeal.

Appeal allowed.

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February, 22

Before Mr. Justice Ryves and Mr. Justice Daniels.

AHMAD HUSAIN (PLAINTIFF) v. MUHAMMAD FASIH-ULLAH AND OTHERS (DEFENDANTS).*

Second appeal—Appeal below barred by limitation—Refusal of lower appellate court to extend time—Second appeal not entertained by High Court.

No second appeal will be entertained by the High Court where the lower appellate court, in the exercise of its discretion, has refused to admit an appeal which *prima facie* was barred by limitation. *Buddhu* v. *Diwan* (1) and *Brij Indar Singh* v. *Kanshi Ram* (2) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. *M. L. Agarwala*, Mr. *Muhammad Yusuf* and Pandit *Uma Shankar Bajpai*, for the appellant.

Munshi *Kamla Kant Varma*, for the respondents.

RYVES and DANIELS, JJ.—The facts out of which this appeal has arisen are as follows. The plaintiff brought a suit in the court of the Subordinate Judge of Ghazipur on the 15th

* Second Appeal No. 1586 of 1921, from a decree of J. Allsop, District Judge of Ghazipur, dated the 5th of August, 1921, confirming a decree of Rama Das, Subordinate Judge of Ghazipur, dated the 21st of March, 1921.

(1) (1915) I. L. R., 37 All., 267.
(2) (1917) I. L. R., 45 Calc., 94.

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of January, 1920. After the evidence had been recorded arguments were heard on the 16th of December, 1920, and judgment was reserved. Judgment was delivered on the 21st of March, 1921, dismissing the plaintiff's suit. We presume that the court adopted the proper procedure prescribed in order XX, rule 1, and gave the parties, or their pleaders, notice of the date on which the judgment was to be delivered, but, in any case, it is admitted by the appellant that he knew, as a matter of fact, that his suit had been dismissed, on the 27th of March, 1921. The decree was not signed by the presiding officer until the 2nd of April. No application was put in for a copy until the 13th of April. An application was then filed in the court of the Subordinate Judge. It was returned, apparently on the 16th of April, on the ground that the record had been sent to the District Judge's record room, and on that date it was presented in the court of the District Judge. The copy was ready on the 20th of April and posted on the notice board. It was not taken delivery of until the 25th of April which was the last day of limitation. The memorandum of appeal was filed on the 3rd of May, 1921, ten days beyond time. The appellant applied to the District Judge to extend the time under section 5 of the Indian Limitation Act and his application was accompanied by an affidavit. The learned District Judge considered the affidavit and came to the conclusion that even if it was true, as the appellant said, that from the 19th of April until the 1st of May he and his *karinda* were both seized with illness which incapacitated them from doing any business, nevertheless, the appellant had shown such laches in attempting to procure the copy of decree which it was essential for him to obtain before he could file his appeal, that as he did not apply for the copy until three days before the period of limitation expired, it was his own risk that he delayed so long; and the learned District Judge in the exercise of his discretion refused to extend the period and dismissed the appeal.

From this order of dismissal the plaintiff comes here in second appeal, and, although it has been laid down in several rulings of this Court that where the lower appellate court exercises a judicial discretion in such matters and decides not to extend the time, this Court will not interfere in second appeal, even if it might have, had it been the lower appellate court, taken another view, it has been argued that in this case there really has been no exercise of discretion on the part of the District Judge and reliance has been placed on *Buddhu* v.

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AHMAD HUSAIN v. MUHAMMAD FASIH ULLAH

Diwan (1) and on the recent Privy Council ruling in *Brij Indar Singh* v. *Kanshi Ram* (2). In that case it was said that where a Judge purporting to exercise such discretion does so under the view that there is no general rule, when in fact there is one which he ought to follow as being binding on him, he misdirects himself as to the law to be applied to the case: he cannot exercise a judicial discretion, and an appellate court should either remand the case or exercise the discretion itself. It seems to us there is no conflict at all between these rulings, and having regard to the judgment of the learned District Judge in this case, we think he has exercised a discretion and dismissed the application on its merits.

In this view of the case the appeal fails and is dismissed with costs.

Appeal dismissed.

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February, 23

Before Mr. Justice Ryves and Mr. Justice Daniels.

RAGHUNATH SINGH AND OTHERS (DEFENDANTS) *v.* SRI NARAIN AND ANOTHER (PLAINTIFFS).*

Hindu law—Joint Hindu family—Hundi executed by manager in respect of debts properly incurred for the benefit of the family—Hundi binding on the family as a whole—Position of manager of joint family as compared with that of a widow.

Where money has been borrowed by the manager of a joint Hindu family *bonâ fide* for legitimate family purposes, he is competent to execute a *hundi* for the loan which will be binding on the family as a whole. *Krishnanand Nath Khare* v. *Raja Ram Singh* (3) followed.

The position of the manager of a joint Hindu family, though in some respects similar to, is by no means identical with that of the widow of a separated Hindu in possession as such of her husband's property.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. *Kailas Nath Katju*, for the appellants.

Munshi *Harnandan Prasad*, for the respondents.

RYVES and DANIELS, JJ.:—These appeals arise out of four suits based on four *hundis* executed in November, 1914, by Harnam Singh, deceased. The defendants appellants are nephews of Harnam Singh and formed a joint family with him. It has been found by both courts below that the debts were incurred in connection with the marriage of one of the appellants, Sahu Raghunath Singh, and that the amount borrowed

* Second Appeal No. 1672 of 1921, from a decree of C. F. Jenkins, District Judge of Budaun, dated the 30th of August, 1921, confirming a decree of Harihar Lal Bhargava, Subordinate Judge of Budaun, dated the 5th of March, 1921.

(1) (1915) I. L. R., 37 All., 267.
(2) (1917) I. L. R., 45 Calc., 94.
(3) (1922) I. L. R., 44 All., 393.

for the purpose of the marriage was not excessive in view of the status of the family On this finding it necessarily follows, and it has been held by the court below, that the debts were incurred for legal necessity

Two pleas have been urged in appeal The first is that inasmuch as a *hundi* is a negotiable instrument within the meaning of the Negotiable Instruments Act, it could not be enforced against the appellants whether it was incurred on behalf of the joint family or not. This point, as the learned advocate for the appellants admits, has been definitely decided against him in the recent case of *Krishnanand Nath Kharc* v. *Raja Ram Singh* (1). It is sufficient for us to say that we agree entirely with the judgment in that case and that we propose to follow it.

The second point taken is that because the debts were simple debts not secured on the joint family property, they must be treated as personal debts of the manager and are not binding on the other members of the joint family. The learned counsel for the appellants goes so far as to argue that even where there is a distinct finding that the debts were incurred by the manager as such and on behalf of the joint family, no liability is incurred except a personal liability on the part of the manager

In appeals Nos 1671 and 1672, no such plea was taken in either of the courts below, and if there had been the only two appeals before us we should have been disposed to dismiss the plea on the simple ground that the appellants were setting up a new case in second appeal, which they are not entitled to do In the other two appeals Nos 294 and 295 of 1922, the point was raised and it has been expressly found by both courts that the debts were incurred by the manager as such and on behalf of the joint family

The only semblance of authority which the learned counsel has been able to adduce for the argument he advances consists of two cases, *Dhiraj Singh* v. *Manga Ram* (2), and *Kallu* v *Fayaz Ali Khan* (3), in which it was held that where a widow in possession of her husband's estate has incurred simple debts, the creditors cannot, after her death, enforce those debts by sale of the family estate against the reversioners even though the purpose for which the debts were incurred might have been

(1) (1922) I. L. R., 44 All., 393.
(2) (1897) I. L. R., 19 All., 300.
(3) (1905) I. L. R., 30 All., 394.

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one for which the widow would have been justified in charging the property. It is suggested that the position of the widow and the position of the manager of a joint family are identical. This is not the case. There are no doubt certain resemblances between the two, and the purposes for which they are entitled to charge the joint family property are, generally speaking, the same. The widow, however, has never to act on behalf of other co-owners. The very fact that the estate has come into her hands shows that the co-parcenary body has ceased to exist. The widow has not, as a manager has, to incur debts and enter into all sorts of transactions in the ordinary course of administration of the estate on behalf of the co-parcenary body of which he is the head. The proposition that a manager can incur simple debts in his capacity as such and on behalf of the family never seems to have been doubted. There are a large number of cases in which it has been held that there is no presumption that any such debt was incurred by the manager on behalf of the family, and some of these cases, such as *Soiru Padmanabh Rangappa* v. *Narayanrao* (1), are cases of simple debts. It is laid down that the person who asserts that a particular debt is binding on the family must prove it, but all these cases clearly assume that if it is proved, the members of the joint family will be liable. The case of *Krishnanand Nath Khare* v. *Raja Ram Singh* (2) referred to above is also an authority on this point. The case is very similar to the one before us. In that case a *hundi* executed by a manager of the joint family, for family purposes, was held to be binding on the entire co-parcenary body. For these reasons we reject both the pleas advanced on behalf of the appellants.

In appeal No. 1672 a cross-objection is put forward by the respondents as to the rate of interest allowed. The *hundi* carried interest at 18 per cent. per annum. The courts below have held that although the debt was incurred for family necessity, there was no necessity to borrow the money at such a high rate of interest. There is the authority of the Privy Council in *Nazir Begam* v. *Rao Raghunath Singh* (3), that where the rate of interest is unduly high a creditor, in order to bind the estate, must prove not only the necessity for the loan but the necessity to borrow it at so extravagant a rate. The point taken by the respondents is that they paid up the interest on the

(1) (1893) I. L. R., 18 Bom., 820.
(2) (1922) I. L. R., 44 All., 363
(3) (1919) L. R., 46 I. A., 145.

original loan, so far as it was then due, in 1917. They suggest, therefore, that the interest should only be reduced from that date. This contention is, in our opinion, unsound. In so far as Harnam Singh acted without legal necessity the appellants are not bound by his acts. The appellants are the nephews and not the sons of the deceased and no question of antecedent debt arises. The appellants cannot be compelled to pay an unnecessarily high rate of interest merely because during the period since the loan was incurred Harnam Singh made to the creditors a payment on account.

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RAGHUNATH SINGH v. SHI NARAIN.

The result is that we dismiss all four appeals with costs.

We also dismiss the cross-objection in appeal No. 1672 with costs.

Appeals dismissed.

Before Sir Grimwood Mears, Knight, Chief Justice, and Justice Sir Pramada Charan Banerji

1923
February, 23.

KUNJ BIHARI LAL AND ANOTHER (DEFENDANTS) v. MUSAMMAT NARAINI AND OTHERS (PLAINTIFFS) *

Temple—Right of woman to offerings made at a temple—Form of decree to enable a woman to obtain the benefit of her right

Although a woman cannot officiate in person at a temple, yet she may be entitled to a share in the offerings made thereat, and it is competent to a court, in order to secure the more effective realization of the share to which she is entitled, to allow her to appoint an agent, and to prescribe certain fixed periods during which such agent may officiate at the temple and receive on her behalf the offerings then made. *Puran Mal* v. *Birj Lal* (1) and *Sri Raman Lalji Maharaj* v. *Sri Gopal Lalji Maharaj* (2) distinguished.

THIS was an appeal under section 10 of the Letters Patent from a judgment of a single Judge of the Court. The facts of the case sufficiently appear from the judgment under appeal, which was as follows :—

"This appeal arises out of a suit brought by the plaintiff respondent, Musammat Narain, for the recovery of property mentioned in the plaint. The property claimed [illegible] property and of a share in the offerings at a certain temple. The plaintiff prayed, with regard to her share in the offerings of the temple, that she should be allowed to take a turn at the worship in the temple, so that her full share in the offerings might be secured to her without any future trouble and litigation.

The claim of Musammat Narain was resisted on several grounds, the principal of which were two only, namely, adverse possession and the non-maintainability of the suit in a civil court. The learned Munsif in whose court the suit was filed held in favour of the plaintiff on all points except that of adverse possession with regard to the offerings at the temple. The claim of Musammat Narain was decreed with regard to the house property and dismissed in respect of the offerings at the temple. She went up in appeal and the decree of the learned Munsif was reversed with regard to the offerings at the temple, in other words, the claim of Musammat Narain was decreed in its entirety by the lower appellate court.

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* Appeal No. 8 of 1922 under section 10 of the Letters Patent.

(1) (1917) I. L. R., 39 All., 671.

(2) (1867) I. L. R., 10 All., 123.

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KUNJ BIHARI LAL v. MUSAMMAT NARAINI.

The defendants have come up in second appeal to this Court and have urged two points, namely, that the suit of Musammat Naraini with regard to the offerings at the temple is barred by limitation and that her suit in its present form is not maintainable. The objection of limitation has no force, inasmuch as Musammat Chanda, the widow, died in 1917 and the cause of action to Musammat Naraini accrued on the death of Musammat Chanda.

As to the second objection, the learned counsel for the appellants relies on the following cases:—*Parsan Mal* v. *Beej Lal* (1) and *Sri Raman Lalji Maharaj* v. *Sri Gopal Lalji Maharaj* (2).

It appears to me that the cases relied upon on behalf of the defence are distinguishable from the facts of the present case. Musammat Naraini does not claim a partition in the management of the temple. She claims her share in the offerings made at the worship in the temple. It is true that she seeks the assistance of the court in having the time fixed for her to officiate at the worship in the temple, or, to be more accurate, as she being a woman cannot officiate at a worship, to have authority for her agent to officiate for her, but that is only a means suggested for the better security of obtaining her share in the offerings. In the two cases referred to above the plaintiffs sought division of the management and superintendence of the temple as trustees. The learned Munsif took the view that I have taken of this case, and gave his decision against the contention of the defendants. It seems that the latter did not object to the finding of the learned Munsif on this point in the lower appellate court, for I find no mention of it made in the judgment under appeal. I think that the objection in question has no force. The appeal fails and is dismissed with costs.

Munshi *Shiva Prasad Sinha* (for Dr. *S. M. Sulaiman*), for the appellants.

Babu *Durga Charan Banerji* and Munshi *Narain Prasad Asthana*, for the respondents.

MEARS, C. J., and BANERJI, J.:—We agree with the view of the learned Judge of this Court and dismiss the appeal with costs.

Appeal dismissed.

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February, 27

Before Mr. Justice Ryves and Mr. Justice Gokul Prasad.

GOBARDHAN DAS (PLAINTIFF) v. MAKUNDI LAL AND ANOTHER (DEFENDANTS).*

Civil Procedure Code, order XXI, rules 58 and 63—Execution of decree—Order refusing to entertain objection to attachment—Order against objector—Suit for possession of attached property—Limitation—Act No. IX of 1908 (Indian Limitation Act), schedule I, article 11.

An order refusing to entertain an objection to the attachment of property in execution of a decree upon the ground that it is filed too late falls within the purview of order XXI, rule 63, of the Code of Civil Procedure. A suit, therefore, to recover possession of the attached property after the objection has been disallowed must be filed within a year from the date of such order. *Venkataratnam* v. *Ranganayakamma* (3) followed.

THE facts of this case sufficiently appear from the judgment of the Court.

* Second Appeal No. 1174 of 1921 from a decree of N. Walker, District Judge of Jhansi, dated the 27th of May, 1921, reversing a decree of Ram Saran Das, Munsif of Jhansi, dated the 16th of February, 1921.

(1) (1917) I. L. R., 39 All., 651.
(2) (1897) I. L. R., 19 All., 428.
(3) (1918) I. L. R., 41 Mad., 985.

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GOVARDHAN DAS v. MAKHAN LAL

Babu *Purn Lal Banerji*, for the appellant.

Mr. *N. C Vaish*, for the respondents.

REVES and GOKUL PRASAD, JJ :—This is a plaintiff's appeal arising out of a suit for possession of a third share of a ruined house No 445 The plaintiff's allegation was that the said one third share was attached by Janki Prasad, father of Ajudhia Prasad, defendant No 2, in execution of a decree of his against Chhote Lal, the tenant of the *khandhal*. The plaintiff zamindar objected to the attachment on the ground that as soon as the house fell in ruins and the tenant had left the village, the site had reverted to him and was, therefore, not saleable. This objection was disallowed in the execution department as having been preferred too late The property was sold by auction on the 17th of September, 1919, and the defendant No. 1 purchased the property. The sale was confirmed on the 27th of November, 1919. When the defendant No. 1 began to rebuild on the said land, the plaintiff tried to stop him but the defendant did not listen to him: hence the present suit The defendant No 2, the son of Janki Prasad decree-holder, was also made a party.

Several pleas were taken in defence and the trial court decreed the plaintiff's claim We are not concerned with those pleas The plea with which we are concerned is one of limitation. It was not raised in the trial court nor was it raised in the grounds of appeal before the learned District Judge. It was, however, raised before him in argument He allowed it to be raised, accepted it and has dismissed the suit.

The plaintiff comes here in second appeal and his contention is that the rule of one year's limitation does not apply and the suit is not so barred This plea of limitation does not raise any question of fact which it might be necessary to decide. It proceeds on the admitted facts of the case, namely, that the objection of the plaintiff was disallowed on the 15th of September, 1919, and the present suit was not instituted until the 20th of October, 1920 This suit was admittedly brought after the expiry of a year from the order of the Munsif refusing to hear the plaintiff's objection which he preferred in the execution department, on the ground that the objection had been made too late It has been urged with great force by the learned vakil for the appellant that article 11 of the first schedule of the Limitation Act of 1908 does not apply inasmuch as the objection taken by the zamindar plaintiff under order XXI, rule 58, was not investigated, and, therefore, order XXI, rule 63,

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does not apply. It is further contended that the rule of one year's limitation applies only to those orders which are passed after investigation of the claim and not to orders in which the claim has not been investigated at all but has been rejected on the ground that it was preferred too late. A large number of rulings under the old Act (No. XIV of 1882) were referred to by the learned vakil for the appellant. It is, however, not necessary to discuss them because there has been an alteration in order XXI, rule 63, as compared with section 283 of the Code of 1882. Section 283 of the old Code expressly mentioned the orders passed under sections 280, 281 and 282 of the Code, whereas the present rule 63 makes no mention of rules 60, 61 and 62. The words of rule 63 read in their natural sense include all orders passed under the preceding rules 58, 60, 61 and 62. This rule is not confined to the orders passed under rules 60, 61 and 62 only. The present rule 63 runs as follows:—"Where a claim or an objection is preferred, the party against whom an order is made may institute a suit to establish the right which he claims to the property in dispute, but, subject to the result of such suit, if any, the order shall be conclusive."

Section 283 of the old Code ran in the following terms: "The party against whom an order under section 280, 281 or 282 is passed may institute a suit to establish the right which he claims to the property in dispute, but subject to the result of such suit, if any, the order shall be conclusive."

In the old Code the only conclusive orders were those passed after investigation either in favour of or against the objector, but not those orders which were passed summarily dismissing the objection on the ground that it was made too late, as provided in section 278 of the old Code. The scope of rule 63 of the present Code is not, however, so confined as to exclude orders passed under rule 58 from its operation, and there is nothing in rule 63 to prevent finality attaching to orders passed under order XXI, rule 58, of the present Code of Civil Procedure.

It is contended on behalf of the appellant that the order passed in the present case was not against the objector plaintiff but that it was an order refusing to investigate the claim without deciding it. The result of the order, however, was that the property was not released from attachment as the plaintiff objector desired but was allowed to be sold, and this is certainly an order adverse to the claimant who wanted to prevent the

property from being sold. It was, therefore, certainly an order against the objector

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The only case exactly in point which we have been able to discover is the Full Bench case of *Venkataratnam* v. *Ranganayakamma* (1), in which the same view of the law has been taken. We agree with the decision of the Full Bench referred to above and are of opinion that the present suit is barred by article 11 of the Indian Limitation Act of 1908.

We, therefore, dismiss this appeal with costs.

Appeal dismissed.

Before Mr Justice Muhammad Rafiq and Mr Justice Lindsay.

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February, 27

HARI SHANKAR (PLAINTIFF) *v* RAM PIARI AND OTHERS (DEFENDANTS).*

Civil Procedure Code, schedule II, paragraphs 15 *and* 16—*Suit for partition—Suit referred to arbitration in absence of one defendant who failed to appear—Decree in accordance with award—Appeal*

H, a member of a joint Hindu family, filed a suit for partition of the family property *S*, one of the defendants, took no part in the proceedings, which were carried on *ex parte* so far as he was concerned All the parties except *S* agreed to refer the dispute to arbitration, and it was so referred and an award was made Both *H* and *S* filed objections to the award, but these were rejected, and a decree was passed which was in accordance with and not in excess of the award

Held that no appeal lay from such decree *Lutaman* v. *Lachya* (2), followed

THE facts of this case sufficiently appear from the judgment of the Court

Munshi *Ajudhia Nath*, for the appellants.

Dr. *Kailas Nath Katju*, and Munshi *Kailas Chandra Mital*, for the respondents.

MUHAMMAD RAFIQ and LINDSAY, JJ :—The two appeals Nos. 391 and 392 of 1920 are connected inasmuch as they arise out of a suit brought by Hari Shankar on the 11th of December, 1918, in the court of the Subordinate Judge of Meerut for partition. Hari Shankar alleged in his plaint that he and Shankar Lal were the sons of Pandit Ram Chandar who was the brother of Pandit Chajju Mal The family was joint and no partition of the family property had taken place. Hari Shankar did not propose to remain joint with his uncle Chajju Mal and, therefore, claimed partition Among the array of defendants was Shankar Lal, the brother of the plaintiff. Shankar Lal put in no written statement The other defendants resisted the suit by filing written statements and raising

* First Appeal No 391 of 1920, from a decree of Abdul Halim, Subordinate Judge of Meerut, dated the 15th of September, 1920

(1) (1918) I L R . 41 Mad , 985

(2) (1913) I L R , 36 All., 69.

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various pleas. As Shankar Lal had failed to file a written statement within the time allowed by the first court, a *rubkar* dated the 1st of February, 1919, was drawn up by the presiding officer of the court directing that the proceedings against Shankar Lal be *ex parte*. Subsequently on the 10th of June, 1920, all the parties to the litigation with the exception of Shankar Lal signed an agreement referring the dispute to the arbitration of Chaubey Radhe Lal. Shankar Lal declined to sign the agreement and wanted the court to decide the case itself. The matter was referred to Chaubey Radhe Lal who gave his award on the 2nd of September, 1920. The plaintiff and Shankar Lal filed objections on the 11th of September, 1920, objecting to the award. Shankar Lal objected on the ground that he was no party to the reference and therefore the award was invalid. Hari Shankar, the plaintiff, took the same objection as also others. The learned Subordinate Judge disallowed the objections of the two brothers and passed a decree in terms of the award. The two brothers Hari Shankar, the plaintiff, and Shankar Lal, one of the defendants, have preferred two appeals before us.

The learned counsel for the respondents takes a preliminary objection to the appeals to the effect that no appeals lie in view of the provisions of sections 15 and 16 of the second schedule of the Code of Civil Procedure. In support of his contention he cites the case of *Lutawan* v. *Lachya* (1), a Full Bench ruling of this Court. It is contended on behalf of the respondents that under the law objections, if any, should be taken by the parties objecting to the validity of the award in the court in which the award is filed; and in case those objections are disallowed or any objections are omitted or none taken, no appeal can lie on the ground that the award was invalid. The only ground upon which an appeal would lie from a decree passed upon the award would be a case where the decree is either not in accordance with the award or is in excess of the award. In the present case the objection that is urged now before this Court was urged in the court below and was rejected. The two appellants do not challenge the decree of the lower court on the ground that the decree is in excess of the award or is not in accordance with it. For the two appellants, Hari Shankar and Shankar Lal, it is contended that as Shankar Lal was no party to the reference and as the dismissal of the claim of Hari Shankar affects the question of the character of the family, i.e., whether it was joint or divided, and hence affects

(1) (1913) I. L. R., 36 All., 69.

the rights of Shankar Lal also, the decree should not be considered to be binding upon Shankar Lal. And if the award is vitiated because of the fact of Shankar Lal not joining in the reference, the entire decree of the court below is bad and should be set aside. The contention for the two appellants is not sustainable in view of the Full Bench ruling of this Court cited above. The learned counsel for the appellants wishes to cite the case law of other High Courts which is not in consonance with the view taken in the Full Bench case of this Court. We think we are bound by the case of our own Court and we should follow it. We must, therefore, give effect to the preliminary objection on behalf of the respondent and hold that the two appeals are not maintainable. We, therefore, dismiss them with costs.

Appeals dismissed.

Before Mr. Justice Ryves and Mr. Justice Daniels

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February, 27.

SECRETARY OF STATE FOR INDIA IN COUNCIL (DEFENDANT) *v.* AKBAR ALI AND ANOTHER (PLAINTIFFS) *

Act No I of 1894 (Land Acquisition Act), section 6—Notification that land is required for a public purpose—Jurisdiction of court to inquire whether the purpose is a "public purpose" excluded

Where a declaration has been issued under section 6 of the Land Acquisition Act, 1894, stating that certain land is required for a "public purpose," a court is debarred from inquiring into the question whether the purpose for which the land, in respect of which such a declaration has been issued, is required is a public purpose or not. *Trustees for the Improvement of Calcutta* v *Chandra Kanta Ghosh* (1) and *Manick Chand Mahata* v *The Corporation of Calcutta* (2) distinguished.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Lalit Mohan Banerji*, for the appellant.

Dr. *M. L. Agarwala*, and Mr. *N. C. Vaish*, for the respondents.

RYVES and DANIELS, JJ.:—This appeal arises out of a suit brought by the plaintiffs respondents Akbar Ali and Bande Ali for the recovery of certain land which the Collector purported to acquire on behalf of the Secretary of State for a public purpose, under the provisions of the Land Acquisition Act, 1894. A notification was duly issued under section 6 of the

* Second Appeal No 1372 of 1921, from a decree of Raghunath Prasad, Officiating District Judge of Mainpuri, dated the 4th of August, 1921, confirming a decree of Tajammul Husain, Munsif of Etawah, dated the 30th of October, 1920.

(1) (1919) I. L. R., 47 Calc., 500

(2) (1921) I. L. R., 48 Calc., 916.

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Act stating that the land was required for a public purpose, and, under section 7 of the Act, the Collector of Etawah was directed to take order for the acquisition of the land. The usual acquisition proceedings under subsequent sections of the Land Acquisition Act followed, and, ultimately, the Collector took possession of the land under section 16 of the Act. Sub-section (3) of section 6 of the Act declares that a declaration under this section shall be conclusive evidence that the land is needed for a public purpose or for a company, as the case may be. The sole ground on which the suit has been decreed in the courts below is that, in spite of this declaration, the land was not really needed for a public purpose. It is said that certain land of Bhatele Shiam Bihari Lal had been acquired for the purpose of the Islamia School and under an agreement entered into between the Collector of Etawah and Shiam Bihari Lal, prior to the acquisition, the land now in dispute was acquired in order to be given over to Shiam Bihari Lal in return for his land which had been acquired. Before, however, the courts can enter into the question whether the purpose for which the land was acquired was a public purpose or not, it must be found that they have jurisdiction to do this. In fact the argument of the plaintiffs, which has been accepted by the courts below, is that sub-section (3) of section 6 does not mean what in plain language it says, and that although the statute declares in so many words that the declaration is conclusive evidence that the purpose for which the land was acquired was a public purpose, it is nevertheless open to the courts to go into evidence and adjudicate upon the question whether it was a public purpose or not. In support of this startling proposition reliance is placed on two rulings, the ruling of the Privy Council in the case of *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh* (1) and the ruling of a single Judge of the Calcutta High Court in an original suit, *Manick Chand Mahata* v. *The Corporation of Calcutta* (2). In fact neither of these cases turns on the construction of section 6 of the Land Acquisition Act. The Privy Council case turns entirely upon the construction of certain sections of the Calcutta Improvement Act, and their Lordships expressly say that during the course of the argument their attention was directed to a number of decisions upon various Acts of Parliament giving compulsory powers for the acquisition of land, but that in each case the

(1) (1919) I. L. R., 47 Calc., 500.
(2) (1921) I. L. R., 48 Calc., 916.

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decision must depend upon the provisions of the particular Act and the purpose for which and conditions under which, in such Act, land may be compulsorily acquired. This case is no authority on the construction of section 6 of the Land Acquisition Act. The other case was one in which certain land had been acquired on behalf of the Improvement Trust by the Calcutta Corporation. A notification had been issued under section 6 of the Act. Mr. JUSTICE GREAVES, who decided the case, held that however conclusive a notification under section 6 of the Act might be, it did not prevent his inquiring into the question whether the Calcutta Corporation had statutory powers to take steps at all for the acquirement of this land. This decision also, therefore, does not touch the point before us. The language of section 6 of the Land Acquisition Act is perfectly plain and clearly bars the courts from inquiring into the question whether the purpose for which land, in respect of which a declaration under section 6 has been issued, is required is a public purpose or not. The appeal must, therefore, be allowed and we accordingly allow it and dismiss the suit with costs in all courts.

Appeal allowed.

Before Mr. Justice Ryves and Mr. Justice Daniels

1923

March, 6

RAM CHANDAR AND OTHERS (DEFENDANTS) v. CHHABBU LAL (PLAINTIFF) *

Birt jajmani—Offerings made to pragwals by pilgrims—Partition—Method of effecting partition.

In a case where partition of a *birt jajmani*, consisting of offerings given to a *pragwal* by pilgrims who came to bathe in the Ganges, was sought, it was *held* that the division should be carried out—not by allotting clients to one party or the other but by division of the *pothis*, or books in which the names of the clients were entered. In the case of accessories, such as the flag, etc., which were not capable of division, it would be open to the officer making the partition to allow each party to use a similar flag. *Ram Madho Pragwal* v. *Hira Lal* (1), *Lokya* v. *Sukh* (2), and *Narayan Lal Gupta* v. *Chuttan Lal Gupta* (3) referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *N. C. Vaish* and Dr. *Kailas Nath Katju*, for the appellants.

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* Second Appeal No. 750 of 1922, from a decree of B. J. Dalal, District Judge of [illegible], dated the 13th of February, 1922, confirming a decree of Shibendra Nath Banerji, Officiating Subordinate Judge of [illegible], dated the 5th of November, 1921.

(1) (1920) I. L. R., 43 All., 20.
(2) (1920) I. L. R., 43 All., 35.
(3) (1911) 15 C. L. J., 375.

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RAM CHANDAR v. CHHABBU LAL.

Pandit *Uma Shankar Bajpai* and Babu *Piari Lal Banerji*, for the respondent

REYES and DANIELS, JJ. :—This appeal raises an interesting and difficult question. Chhabbu Lal, the plaintiff, sued his cousin, Ram Chandar, and the two sons of Ram Chandar for partition of the joint family property. The parties are descended from a common ancestor, Ganga Prasad, who was a *pragwal*. The family property consisted of land, houses and *birt jajmani*. The defendants admitted that the family had been joint and that the plaintiff was entitled to partition but pleaded that a partition had, in fact, already taken place and that a suit would not lie for a second partition. With regard to the *birt jajmani* the defendants pleaded that it had already been partitioned in the only way in which partition was possible, that is to say, it had been agreed to divide the income. In this appeal we are only concerned with two items : (1) a certain house built on land bounded by the letters B. C. H. E. on the map on the record and (2) the *birt jajmani*. Dealing with the second item first, the trial court held that it was impossible to give a decree for partition of this *birt jajmani* and gave a declaration to the effect that the parties were entitled to enjoy the income of it half and half.

The plaintiff appealed, and the learned District Judge held that the *birt jajmani* was property which had been held to be heritable, and, therefore, should be capable of division. He said :—

> "There may be a little difficulty in arriving at a fair division, but that is after all a matter of procedure and the difficulty cannot be said to amount to an impossibility. When steps are taken consequent on the preliminary decree, care will be taken to make the division as far as possible either by distribution of clients or of localities."

And he modified the decree of the court below by ordering that partition should be made of the *birt jajmani* as well as of the other property.

From this decree the defendants have appealed and it is urged on their behalf that it is impossible to divide once and for all this *birt jajmani*, and they urged that the decree of the first court merely declaring the parties entitled to a moiety of the *birt jajmani* be restored. There is no doubt that in *Beni Madho Pragwal* v. *Hira Lal* (1) and in *Lakya* v. *Sulli* (2), it has been held by a Divisional Bench of this Court that this

(1) (1920) I. L. R., 43 All., 20.
(2) (1920) I. L. R., 43 All., 36.

class of property, namely, *birt jajmani*, has been the subject-matter of decisions by the various courts in India, that the rights of owners of *birt jajmani* have repeatedly been upheld, and that such rights are heritable and sometimes transferable. The latter case is really very similar to this, the only distinction being that there the plaintiffs only asked for a declaration of their right to a given share in the *birt jajmani* and did not ask for partition of it. The case which seems to us most in point is *Narayan Lal Gupta* v. *Chulhan Lal Gupta* (1), where the whole question is considered in an elaborate judgment by Mr. JUSTICE MOOKERJEE. The *birt jajmani* in this case consists of the offerings given to the descendants of Ganga Prasad by pilgrims when they come to bathe in the Ganges at Allahabad, for the ministrations of *pragwals*. It is obvious that it would be impossible to partition the future income from this source or to allot certain clients either by locality or family to one or other of the parties, for the simple reason that no pilgrim can be forced to accept the services of any particular *pragwal* and, obviously, not being parties to this litigation, pilgrims, either as a body or individually, could not be bound by it. We find, however, in the schedule attached to the plaint various paraphernalia belonging to this particular *birt jajmani* described, namely, the *pothis* or books in which pilgrims enter their names, the *ghat*, the *chauki*, the platform, the shed and the distinctive flag which indicates to the pilgrims on their arrival, where this particular *pragwal* owning the *birt* can be found. We see no reason why these articles should not be divided, and the result of this will be, in practice, a division of the *birt*.—In the Calcutta case MR. JUSTICE MOOKERJEE suggested that a possible partition could be arrived at by allocating to the parties their proportionate share of the names entered in these books. He suggested that the three claimants in that case should each get a third of the original entries and certified copies of two-thirds of the rest of the entries. Whether it will be necessary in this case to give certified copies is a matter which will be in the consideration of the officer who makes the actual partition. We do not suggest that the method we have indicated is the only method that can be employed. It is to be hoped that the parties will come to some agreement between themselves, because, unless they do come to some agreement amongst themselves, it seems impossible to indicate any plan which will ensure peace.

(1) (1911) 15 C. L. J., 376

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RAM CHANDAR v. CHHABBU LAL.

Turning now to the first point which is raised in a cross-objection by the plaintiff, it has been found by both courts that the house in question was built on land which is joint family property, but it was built some 14 years ago at a time when the members of the family had ceased to live jointly, although there had been no actual partition by metes and bounds. The house was built by a son of the defendant Ram Chandar, since deceased, out of funds of his own. Both courts, therefore, held that this house could not be partitioned at the suit of the plaintiff, and have refused to have it partitioned. The cross-objection refers more to the wording of the decree than anything else. It is pointed out that as the decree stands, there is nothing to indicate that, at the actual partition, the joint land i.e., the site on which this house is built, is not now capable of partition, and, therefore, when the rest of the land is being partitioned it must be borne in mind that the defendants have already received in their share the site on which this house has been built and account must be taken of that fact in partitioning the remainder of the joint land. In making the final partition the officer will take care to give to the plaintiff land or compensation equivalent to that occupied by the site of the house.

We modify the lower court's decree to this extent that we declare that the division of the *biri jajmani* cannot be carried out by allotting clients to one party or the other but only by the division of books and other accessories referred to in the schedule to the plaint. In the case of accessories such as flag, etc., which are not capable of division, it will be open to the officer making the partition to allow each party to use a similar flag. In other respects the appeal is dismissed.

We allow the cross-objection to this extent that we declare that the site of the house in question shall be taken into consideration at the time of making the final partition and the plaintiff will be given an equivalent in land or compensation for the site of the house. Under the circumstances we direct the parties to bear their own costs.

Decree modified.

Before Mr Justice Muhammad Rafiq and Mr Justice Lindsay 1923
ALIMAN BEGAM (PLAINTIFF) *v* ALI HUSAIN AND ANOTHER (DEFENDANTS) * *March*, 7.
Muhammadan law—Pre-emption—Talab-i-ishtishhad

In the case of a claim for pre-emption according to the Muhammadan law, if the second demand is made, neither in the presence of the vendor nor on the property sought to be pre-empted, but in the presence of the vendee, then, if there are more vendees than one, the demand must be made in the presence of all

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

Dr. *S M Sulaiman*, for the appellant.

MUHAMMAD RAFIQ and LINDSAY, JJ. —This appeal arises out of a suit brought by the plaintiff appellant, on the ground of pre-emption under the Muhammadan law. The claim was decreed by the court of first instance. The appellate court, however, took a different view, and dismissed the claim The ground upon which the appellate court dismissed the claim was that the second demand, known under the Muhammadan law as *talab-i-ishtishhad*, was not carried out by the plaintiff appellant as required by the Muhammadan law. It appears that the vendees were husband and wife. The pre-emptor went to the house of vendees and sent for the husband, who came out. In the presence of the witnesses the pre-emptor made a second demand, and the husband listened to it The wife was admittedly not present at the time when the second demand was made The Muhammadan law requires that the second demand should be made either in the presence of the vendor or the vendee or on the property that is the subject of pre-emption. The singular words, vendor and vendee, include the plural also. According to the interpretation of the Muhammadan lawyers, if the demand is made neither in the presence of the vendor nor on the property sought to be pre-empted, but in the presence of the vendee, then in case there are more than one vendee, the demand should be made in the presence of all.

The view taken by the learned Judge of the lower appellate court, that the second demand made by the pre-emptor was defective, is quite correct.

The appeal fails and is dismissed under order XLI, rule 11, of the Code of Civil Procedure.

Appeal dismissed

* Second Appeal No 1695 of 1922, from a decree of Ram Chandra Saksena, District Judge of Shahjahanpur, dated the 17th of July, 1922, reversing a decree of the Munsif of Shahjahanpur, dated the 9th of September, 1920.

1923
March, 7

Before Mr. Justice Reyes and Mr. Justice Daniels.

PRAG NARAIN AND ANOTHER (DEFENDANTS) v. JWALA PRASAD AND OTHERS (PLAINTIFFS).*

Act (Local) No. III of 1903 (Bundelkhand Alienation of Land Act), sections 6, 17 and 22—Power of court to question action taken by Collector if ultra vires—Mortgage of undivided share to non-agriculturist—Substitution of usufructuary mortgage of specific plots.

Section 22 of the Bundelkhand Alienation of Land Act, 1903, does not prevent persons interested from questioning in a civil court any action taken by a Collector, which purports to be taken under the provisions of the Act, if such action is not within the powers conferred by the Act.

Where the mortgagees, not being members of an agricultural tribe, had obtained a decree for sale on a mortgage of a 10 pie undivided share in a certain *patti*, it was *held* that the Collector was not authorized by the provisions of the Act to give the mortgagees a usufructuary mortgage of certain specific plots as equivalent to the undivided share mortgaged, except in so far as there might be such specific plots in the actual possession of the mortgagor.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *N. C. Vaish*, for the appellants.

Mr. *A. P. Dube*, for the respondents.

REYES and DANIELS, JJ.:—This appeal raises a point of law under the Bundelkhand Land Alienation Act. A decree had been passed against Jwala Prasad, one of the plaintiffs, on a mortgage in favour of the defendants Prag Narain and Beni Prasad. The decree is not before us but it appears that it was transferred to the Collector, under section 17 of the Act, inasmuch as the mortgagees were not members of an agricultural tribe. The first plaintiff Jwala Prasad was owner of an undivided share in a 5 anna 4 pie *patti*. The rents of the entire *patti* were collected by the *lambardar* who, as it happend, was at that time Jwala Prasad himself. The share mortgaged was a 10 pie undivided share out of this *patti*. The Collector, purporting to act under the provisions of section 6 of the Act, selected certain specific plots, which he considered to be the equivalent of a 10 pie share, and gave the defendants a usufructuary mortgage of these plots for a term of 20 years. The present suit was brought by Jwala Prasad and the two other co-sharers in the *patti*, Sukhnandan and Sheo Dayal, for a declaration that the mortgage executed by the Collector, so far as it purported to transfer possession of specific plots and to give the mortgagees the right either to cultivate these plots or to collect the rents of them, was *ultra vires*. The suit has been decreed by the

* Second Appeal No. 1686 of 1921, from a decree of N. Walker, District Judge of Jhansi, dated the 2nd of September, 1921, confirming a decree of Jotindra Mohan Basu, Subordinate Judge of Jhansi, dated the 30th of May, 1921.

courts below. The defendants appealed to this Court on two grounds :—

(1) That the mortgage was within the powers vested in the Collector by the Act.

(2) That the civil court is precluded by section 22 of the Act from entertaining the present suit.

Two of the plots in suit, Nos. 19 and 195, were in the actual possession of Jwala Prasad as *khudkasht*. The first court dismissed the suit as regards these plots. We are unable to appreciate the reasons which led the learned District Judge, on a cross-objection by the plaintiffs, to set aside this portion of the trial court's decree. It seems to us that it was perfectly open to the Collector to transfer to the mortgagees the possession of lands which were in the actual possession of the mortgagor.

Section 22 of the Act lays down that no civil court shall take cognizance of the manner in which the Local Government or any Revenue Officer exercises any powers vested in it or in him by or under this Act The appellant treats this as meaning that the civil courts have no jurisdiction to question anything done by the Collector which purports to be done under the Act. The lower courts have met the objection by holding, first, that what was done in this case was in excess of the powers conferred by the Act, and, secondly, that it is clearly open to third parties, whose interests are affected, to challenge the validity of a mortgage which interferes with their rights. In this case the second and third defendants were no parties to the proceedings before the Collector in the course of which the mortgage was executed

Section 6 of the Act provides various ways in which the Collector can exercise the powers given to him by the Act. It is entirely within his discretion which of those ways he shall adopt, and no civil court can question the exercise of his discretion in this matter. It is clear, however, from the language both of sub-section (1) and of sub-section (2) of section 22 that the effect of that section is not to cover any act which is done in excess of powers conferred by the Act. If, therefore, the Collector in granting the lease was acting illegally and in excess of his powers, section 22 will not have the effect of ousting the civil court's jurisdiction

The position taken up by the parties on the first issue is this The plaintiffs rely on the fact that the defendant was

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PRAG NARAIN v. JWALA PRASAD

not in actual possession of any particular plots in the *patti* and that his only right was to receive his share of the profits. The Collector has, therefore, given to the mortgagees a right which the mortgagor himself did not possess. It is true that Jwala Prasad was himself the *lambardar*, but as *lambardar* he was merely acting as agent of the co-sharers and not on his own behalf, and he was liable to be ousted from the position of *lambardar* at any time. On the other hand, the respondents contend that the only right of the second and third plaintiffs was to receive their two-third share of the profits of the *patti*. This right has, in no way, been impaired by anything that the Collector has done. The mortgagees are entitled to profits equivalent to the profits of a 10 pie share and it makes no difference to the other plaintiffs whether the mortgagees are realizing these profits direct from the cultivators or whether they are paid over to them by the *lambardar*.

In our opinion the plaintiffs' contention is correct. What the Collector has done is to make a partition of the *patti* behind the backs of other co-sharers for the benefit of the mortgagees. There is nothing in the Act which authorizes him to do this. The Collector could only mortgage the right which the judgment-debtor has, and, except as regards the plots in his possession as *khudkasht*, that right was a right to receive his share on a distribution of the profits of the *patti*. The fact that he happened to be a *lambardar* at the time is irrelevant. The *lambardar* is the agent of the co-sharers for purposes of collection, but the fact of his being *lambardar* in no way increases or alters his personal rights as proprietor. The argument that the other co-sharers are in no way prejudiced is fallacious. It is true that their income at the time of the execution of the mortgage might not have been decreased. The mortgage, however, is to last for 30 years. During that time they are deprived of all control over these particular tenants, of the right of ejecting them or enhancing their rents, and should there at any time be a partition, the co-sharers to whom these lands are assigned would be unable to obtain possession over them.

For these reasons we allow the appeal in part, and setting aside the decree of the learned District Judge, restore the decree of the trial court. As the appeal has partly succeeded and partly failed, the parties will bear their own costs.

Appeal allowed.

REVISIONAL CIVIL.

1923
March, 8.

Before Mr Justice Muhammad Rafiq

KEDAR NATH, RAJ NARAIN (PLAINTIFF) *v* THE EAST INDIAN RAILWAY COMPANY (DEFENDANT) *

Act No IX of 1890 (*Indian Railways Act*), *schedule II, articles* (*d*) *and* (*k*) *—Railway company—Liability in respect of goods consigned under risk-note form X, but not being goods mentioned in schedule II—Wax pearls*

Risk-note form X relates to the excepted articles mentioned in schedule II of the Indian Railways Act, 1890. If, therefore, the goods consigned under a risk-note in form X are not such articles, the use of the risk-note will not exempt the Railway Company from liability.

Held also that wax pearls cannot properly be described as "articles made of glass" *Tiyagaraja Padyachi* v *Ramanujam Pillai* (1), referred to

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. *Kailas Nath Katju*, for the applicant.

Pandit *Ladli Prasad Zutshi*, for the opposite party.

MUHAMMAD RAFIQ, J.:—This is an application in revision by a firm styled the firm of Kedar Nath Raj Narain, from a decree of the Small Cause Court Judge of Agra dismissing their claim for damages against the East Indian Railway Company.

The case for the plaintiff firm was that they bought some articles at Calcutta through their agent, who consigned three boxes to them at Agra. One of the boxes was lost in transit, and hence the claim for the price of the goods contained in that box. The defence of the Railway Company was that as the consignor had given a risk-note, they were not liable for the loss. It was further pleaded that the goods consigned to Agra were glass beads, which came under the excepted articles mentioned in the second schedule of the Railways Act under clause (*d*) The learned Judge of the Small Cause Court held that the lost goods fell under clause (*k*), and the consignor having chosen to give the risk-note X, the Railway Company was not liable. The claim was accordingly dismissed. In revision the contention for the plaintiff firm is that the lost goods do not fall under clause (*k*) of the second schedule of the Railways Act If they do not fall under the said clause, the giving of the risk-note X by the consignor does

* Civil Revision No 144 of 1922

(1) (1883) I L. R., 6 Mad., 422

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not exonerate the Railway Company from liability. The clause (*k*) mentions the articles which are described as "excepted articles." They are pearls, jewellery and all articles made of glass, china or marble.

The lost goods, though described in the risk-note given by the consignor as glass beads, are really what are called in the vernacular as *moni motis*, that is, wax pearls.

It is contended on behalf of the Railway Company that the wax pearls would not fall under clause (*d*) of the second schedule, but they would come under clause (*k*), because the covering of the pearl is of thin glass. Some of the wax pearls were produced in the court below and are on the record. On examining them it appears that the major portion of the constitution of the wax pearls is wax and there is only a thin covering of glass over the wax. I do not think that these wax pearls can properly be described as articles made of glass. In a similar case where the question was whether an article was of pure silk or manufactured silk, the Madras High Court held that where a manufactured article contained only one-eighth of silk and seven-eighth of cotton, the article could not be said to be made of manufactured silk; *vide Tiyagaraja Padyachi* v. *Ramanujam Pillai* (1). But it is, however, contended on behalf of the Railway Company, that as the consignor had given the risk-note X the company is not liable. A perusal of this risk-note X shows that it relates to the excepted articles mentioned in schedule II of the Indian Railways Act. If the article in respect of which the risk-note X was given was not one of the excepted articles, the mere giving of the risk-note X would not take away the liability of the Railway Company. I, therefore, hold that the Railway Company is liable for the price of the lost goods. The application is allowed. The decree of the court below is set aside, and the claim of the plaintiff firm is decreed for Rs. 250. Costs in proportion to success and failure are allowed to parties.

Application allowed.

(1) (1883) I. L. R., 6 Mad., 422.

APPELLATE CIVIL.

1923
March, 12.

Before Mr Justice Walsh and Mr. Justice Ryves

JAGANNATH SINGH (JUDGMENT-DEBTOR) *v.* MOTI LAL AND OTHERS (DECREE-HOLDERS) *

Civil Procedure Code, section 53—Execution of decree—Liability of property for debts of deceased judgment-debtor.

Under section 53 of the Code of Civil Procedure it is only the son or lineal descendant who comes within the scope of the section *Chunilal Haribal* v. *Bai Mani* (1), referred to

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Kamla Kanta Varma*, (for Munshi *Kumuda Prasad*), for the appellant.

Pandit *Narmadeshwar Prasad Upadhiya*, for the respondents.

WALSH and RYVES, JJ. :—Moti Lal and others, plaintiffs, obtained a simple money decree against Jatan Singh. He died, and the plaintiffs decree-holders applied to attach certain property in the possession of Jagannath Singh, claiming that Jatan Singh was the uncle of Jagannath Singh and that they formed a joint Hindu family. Various objections were taken by Jagannath Singh under section 47 of the Code of Civil Procedure. The trial court held that Jatan Singh was the uncle of Jagannath Singh, but said that, as the decree was clearly a personal decree and was not passed against Jatan as the *karta* of a joint family, there was no obligation on Jagannath Singh to pay Jatan Singh's debt and that the property was not liable to attachment and sale. The decree-holders appealed, and the learned Subordinate Judge held that under section 53 of the Code of Civil Procedure the words "or their descendant" included a nephew, and, therefore, reversed the finding of the trial court and remanded the case for trial of the other issues.

Jagannath Singh comes here in appeal against the order of remand. The point turns on the interpretation to be put on section 53 of the Code of Civil Procedure. This section was introduced into the Code by Act V of 1908 It says that for the purpose of section 50, property in the hands of a son or other descendant which is liable under the Hindu law for the payment of the debt of the deceased ancestor in respect of which a decree has been passed shall be deemed to be the

* First Appeal No 159 of 1922, from an order of Ali Ausat, Subordinate Judge of Jaunpur, dated the 28th of June, 1922

(1) (1918) I L R, 42 Bom., 504.

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property of the deceased which had come into the hands of the son or other descendant as his legal representative. It is noteworthy that the son or other descendant can only be charged if the property is liable under the Hindu law for the payment of the debt of a deceased ancestor. Sir Ernest Trevelyan in the second edition of his Hindu Law, at p. 323, sums up the law in the following words:—

"Apart from the obligation of a son or grandson to pay the debts of his father or grandfather out of [illegible] property, the Hindu law, like other systems of law, requires the [illegible] who succeeds to the property of another as heir or devisee, to pay [illegible] debts of such other person, whatever may be the purpose of such debts, to the extent of the assets received by him. There is no obligation upon any other co-parcener who has acquired rights by survivorship to pay the debts of the deceased co-parcener."

It seems, therefore, that under section 53 it is only the son or lineal descendant who comes within the scope of the section. We are fortified in this view by the decision of the case of *Chunilal Harilal* v. *Bai Mani* (1). In this view the appeal succeeds and the order of remand must be set aside and the decree of the first court restored with costs in all courts.

Appeal allowed.

1923

March, 15.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Lindsay.

GIRDHARI SINGH AND ANOTHER (DEFENDANTS) v. BHUPAL SINGH AND OTHERS (PLAINTIFFS) AND SHAMLI SINGH (DEFENDANT).*

Pre-emption—Decree for pre-emption—Extension by lower appellate court of the time allowed for payment—Discretion of court—Second appeal.

The High Court will not interfere in second appeal where the lower appellate court has in the exercise of its judicial discretion extended the time allowed by the court of first instance for compliance with the terms of a decree for pre-emption. *Kadri Singh* v. *Jaisri Singh* (2) and *Khurshed-un-nissa* v. *Alim-un-nissa* (3), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. *Surendra Nath Sen* and Munshi *Baleshwari Prasad*, for the appellants.

Munshi *Gulzari Lal*, for the respondents.

MUHAMMAD RAFIQ and LINDSAY, JJ.:—This second appeal arises out of a pre-emption suit. The question before us is whether the lower appellate court had a right to extend the time for payment into court of the pre-emption money.

* Second Appeal No. 1147 of 1921, from a decree of Raghunath Prasad, Subordinate Judge of Mainpuri, dated the 26th of April, 1921, confirming a decree of Ganga Nath, Munsif of Mainpuri, dated the 18th of September, 1919.

(1) (1918) I. L. R., 42 Bom., 504.
(2) (1889) I. L. R., 13 All., 189.
(3) (1912) 10 A. L. J., 421.

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It appears that the plaintiffs were given a decree for pre-emption, by which they were required to pay a sum of Rs. 800 into court within a period of thirty days from the decision of the first court's decree. That decree was passed three days before the courts closed for the long vacation, so that we have it that the plaintiffs had really only a period of three days to deposit the money.

An application was made after the vacation for the reception of the money by the court. The application was declined on the ground that the court had no authority to extend the time.

The plaintiffs appealed to the District Judge In the memorandum of appeal as presented, the only ground taken was that the price which had been fixed by the court below was excessive. It seems, however, that at a later stage the plaintiffs were allowed to add another ground of appeal, taking exception to the short time which the first court had allowed for payment into court of the pre-emption money.

The lower appellate court agreed with the first court regarding the sum which the plaintiffs pre-emptors were bound to pay, i e , Rs 800 The learned Judge in his judgment found that the time which had been allowed to the plaintiffs for paying the money into court was too short. Consequently, although he upheld the first court regarding the amount of pre-emption money, he thought that he was entitled to extend the time and he extended it accordingly.

In view of the rulings which have been cited to us, namely, *Kodai Singh* v *Jairi Singh* (1) and *Khurshed-un-nissa* v *Alim-un-nissa* (2) it appears to us that this appeal cannot succeed According to these judgments the court below had a discretion to extend the time If that discretion has been judicially exercised this Court does not interfere in second appeal. We, therefore, dismiss the appeal with costs.

Appeal dismissed

(1) (1889) I L R , 13 All , 189
(2) (1912) 10 A L J , 421.

1923
March, 16.

MISCELLANEOUS CIVIL.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Lindsay.

MARIAM UN NISSA BIBI (PLAINTIFF) *v.* BABU RAM AND OTHERS (DEFENDANTS).*

Review of judgment—High Court—Jurisdiction—Second appeal—Discovery of fresh evidence after disposal of appeal in the court below.

The High Court cannot, in a second appeal, entertain an application for a review of judgment on the ground that since the disposal of the appeal, documentary evidence has been discovered, which, if sufficiently proved, would have led the court below to come to a different finding, although, had such evidence been discovered before the disposal of the appeal, the court might have allowed the appellant to withdraw the appeal with a view to apply to the lower appellate court for a review of judgment on the ground of the discovery of fresh evidence. *In the matter of the petition of Nand Kishore* (1), followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *C. Thompson*, for the applicant.

Babu *Piari Lal Banerji*, Pandit *Uma Shankar Bajpai* and Pandit *Narmadeshwar Prasad Upadhiya*, for the opposite party.

MUHAMMAD RAFIQ and LINDSAY, *JJ.* :—This is an application for review of judgment. The judgment sought to be reviewed is a judgment passed on the 19th of May, 1922, dismissing under order XLI, rule 11, the appeal of one Mariam-un-nissa. The appeal was a second appeal.

The application made before us sets out that certain documentary evidence has been discovered since, which, if entertained, would prove that the plaintiff appellant, Mariam-un-nissa, had a good title to the property in dispute.

The application for review has been opposed on the ground that it is not competent to this Court to entertain such an application, and various authorities have been cited before us. We need only refer to an authority of our own Court in *In the matter of the petition of Nand Kishore* (1).

It was held there, following two other rulings, that the High Court cannot, in a second appeal, entertain an application for a review of judgment based on the ground that since the disposal of the appeal, documentary evidence has been discovered, which, if sufficiently proved, would have led the court below to come to a different finding, although, had such evidence been discovered before the disposal of the appeal, the Court might have allowed the appellant to withdraw the appeal

* Application for review of judgment in Second Appeal No. 282 of 1922.
(1) (1909) I. L. R., 32 All., 71.

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with a view to apply to the lower appellate court for a review of judgment on the ground of the discovery of fresh evidence.

We have already adverted to the fact that the second appeal has already been disposed of by this Court. We can see no ground upon which the present case can be distinguished from the case to which we have just referred. It has been argued before us that the matter before this Court is not a question of fact but a question of law. We cannot agree with this. The case of the plaintiff all through was that certain revenue records had been wrongly prepared and that if the records had been prepared in a proper manner her title to the property would have been established. The courts below found that the plaintiff had failed to give satisfactory proof that the record in question has been wrongly framed. The documentary evidence which has now been preferred is put forward for the purpose of showing that the record was, as a matter of fact, incorrectly framed and to induce us, therefore, to decide in favour of the plaintiff on that basis.

The question whether any particular record has been rightly or wrongly framed is certainly a question of fact and not a question of law. Following the ruling of this Court, to which we have referred above, we hold that this application is not entertainable and we, therefore, dismiss it with costs.

Let these papers be returned to the Collector of Moradabad.

Application disallowed.

APPELLATE CIVIL.

Before Mr Justice Muhammad Rafiq and Mr Justice Lindsay

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March, 16.

SHEO BADAN TIWARI AND ANOTHER (PLAINTIFFS) v. MUSAMMAT SAHIBZADI KUNWAR (DEFENDANT) *

Pre-emption—Wajib-ul-arz—Construction of document—Custom or contract

Where the terms of a *wajib-ul-arz* were to the effect that in case of a transfer by a co-sharer of his share by sale or mortgage, he must give preference to his co-sharers over a stranger, and that in case a mortgage given by a co-sharer has matured and the mortgagor is unable for want of funds to redeem the mortgage, any of his co-sharers can pay off the mortgage and retain the share so redeemed until the original mortgagor is in a position to pay his co-sharer, it was *held* that the terms indicated the existence of a contract between the co-sharers rather than a customary right of pre-emption. *Surajbali Singh* v. *Mohammad Nasir* (1), referred to.

* Second Appeal No 1333 of 1921, from a decree of Jagat Narain, District Judge of Azamgarh, dated the 1st of July, 1921, reversing a decree of Bishun Narain Tankha, Munsif of Mawali, dated the 22nd of December, 1920.

(1) (1918) 16 A. L. J., 879.

1923

SHRO RADAN TIWARI v. MUSAMMAT SAHIBZADI KUNWAR

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Harnandan Prasad*, for the appellants.

Dr. *Kailas Nath Katju*, for the respondent.

MUHAMMAD RAFIQ and LINDSAY, JJ.:—The two appeals, Nos. 1233 and 1234, are connected inasmuch as they arise out of one suit brought by the plaintiffs appellants to pre-empt certain property conveyed by Moti Saran and Musammat Sona Kunwar to the contesting defendants. The claim was resisted on the ground, among others, that the custom of pre-emption alleged in the plaint did not obtain in the village in which the property sold was situate. In support of the alleged custom of pre-emption the plaintiffs appellants produced the wajib-ul-arz of the village. The learned Munsif accepted the recital in the wajib-ul-arz as evidence of the custom stated in the plaint and decreed the claim. On appeal by the vendees, the learned District Judge construed the clause relating to the transfer of a share by a co-sharer in the village differently. He was of opinion that the phraseology of the clause upon which reliance was placed by the pre-emptors negatived their allegation as regards the custom of pre-emption. The appeal was, therefore, allowed and the decree of the first court was set aside and the claim of the pre-emptors was dismissed.

In appeal before us it is contended on behalf of the plaintiffs appellants, the pre-emptors, that the learned District Judge has not interpreted the clause of the wajib-ul-arz relating to the transfer of property by a co-sharer correctly. The clause upon which reliance is placed is to the effect that in case of a transfer by a co-sharer of his share by sale or mortgage he must give preference to his co-sharers over a stranger. It further goes on to say that in case a mortgage given by a co-sharer has matured and the mortgagor is unable for want of funds to redeem the mortgage, any of his co-sharers can pay off the mortgage and retain the share so redeemed until the original mortgagor is in a position to pay his co-sharer. Wajib-ul-arzes of this kind have come up before this Court more than once, and it has been held that the terms that we find in the present wajib-ul-arz do not go to show that they are a record of custom. A reported case on this point is that of *Surajbali Singh* v. *Mahammad Nasir* (1). The wajib-ul-arz in the reported case was also in similar terms to the one before us.

(1) (1916) 16 A. L. J., 879.

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SHEO BADAN TIWARI v. MUSAMMAT SANTBADI KUNWAR.

In the reported case, on interpreting the wajib-ul-arz before them, the learned Judges of this Court held that the entry in the wajib-ul-arz, on the very face of it, disproved the existence of the custom The clause relied upon by the plaintiffs appellants, when read as a whole and examined closely and carefully, goes to show that it mentions matters which the co-sharers had agreed upon and does not mention a custom We agree with the conclusion arrived at by the lower appellate court, and hold that the plaintiffs appellants have failed to prove their allegation of custom. We, therefore, dismiss this appeal with costs.

Appeal dismissed.

Before Justice Sir Pramada Charan Banerji and Mr Justice Gokul Prasad.

1923
March, 16.

BIJAI SHANKAR AND OTHERS (PLAINTIFFS) v. RAM CHARITRA SINGH AND OTHERS (DEFENDANTS) *

Act No IX of 1908 *(Indian Limitation Act), schedule I, article* 120*—Suit for declaration of title to land—Limitation—Plaintiffs out of possession —Alluvion.*

Defendants were owners of village Dhanapur on the banks of the Ganges Plaintiffs were mortgagees of a [illegible] village—Arazi Dayura Dhanapur Adjacent to this latter village [illegible] emerged from the river and was settled with the defendants in 1853 Shortly afterwards the land was submerged, but re-appeared in 1884 and was again settled with the defendants, and it continued to be settled with the defendants until 1920, in spite of various attempts made by the plaintiffs in the revenue and criminal courts to get possession of it In 1901 the plaintiffs instituted a regular suit in the civil court for a declaration of their title to the land, but subsequently withdrew it In 1919 the present suit, in which also only a declaration decree was asked for, was instituted

Held that the suit was not maintainable. The land claimed was not a "gradual accretion" to the plaintiffs' village, and the plaintiffs were not shown ever to have held possession of it And even if they had any right at any time, they had lost it by reason of their not having brought any suit for a declaration of their right within six years prior to the institution of the present suit *Partab Bahadur Singh* v. *Gajadhar Bakhsh Singh* (1) and *Khadi Bakhsh* v. *Alim-un-nissa* (2), referred to.

THE facts of this case are fully stated in the judgment of the Court.

Mr *B E O'Conor*, Mr. *A Sanyal* and Dr. *Surendra Nath Sen* for the appellants

Dr *S M Sulaiman*, Maulvi *Iqbal Ahmad*, Babu *Piari Lal Banerji*, Pandit *Krishna Narain Laghate* and Babu *Surendra Nath Gupta*, for the respondents.

BANERJI and GOKUL PRASAD, JJ. :—This appeal arises out of a suit for a declaration of the plaintiffs' right to some

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* First Appeal No 370 of 1920, from a decree of Kameshwar Nath, Subordinate Judge of Ghazipur, dated the 15th of September, 1920

(1) (1902) I L R 24 All 521

(2) (1904) I L R 27 All 313.

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alluvial land, 1,005 bighas in area. This land has emerged out of the river Ganges which lies to the north of Dhanapur, the village of which the defendants are the owners. To the west of that parent village is a village which has apparently been formed since 1836 and is called Arazi Dayara Dhanapur. The plaintiffs alleged in their plaint that they were the owners of the village Arazi Dayara Dhanapur; that the land in suit had accreted to that village, and, therefore formed an accession to the village: that they had themselves become proprietors of the disputed land, and that the defendants, the owners of the village Dhanapur khas, had no right to the aforesaid land. They based their claim in the plaint upon the custom known as the custom of *dhardhura*. That custom means that the deep stream is the boundary between two villages lying on opposite banks of the stream. Dr. *Sen* has, in his argument, conceded that the present claim cannot be regarded as a claim based upon the custom of *dhardhura*. As we have already stated, the plaintiffs alleged that they were the owners of the village now known as Arazi Dayara Dhanapur. It has been found by the court below that the plaintiffs are not the owners of that village, but that they are mortgagees from the owners of the village, namely, the predecessors in title of the defendants, and that they are in possession of the village as such mortgagees. This position has been accepted by Dr. *Sen* on behalf of the appellants, and he urges that the land in dispute is an accession to the village mortgaged to them, and that their security has thus increased by the addition to it of the alluvial land now in dispute.

It has been established by the evidence adduced in this case that in the year 1836 some land emerged from the river Ganges and this land was settled with the owners of the parent village Dhanapur, and was declared to be the village of Arazi Dayara. In front of this village lies the land now in controversy. In 1853 some 55 bighas of land emerged from the Ganges and it was settled with the defendants' predecessors, namely, the owners of Dhanapur, on a revenue of Rs. 80. After that year the land was submerged and the revenue was reduced to Re. 1, which was paid by the proprietors of Dhanapur. In 1884 the land reappeared and the quantity of culturable land in that year was about 47 bighas. This was again settled with the defendants on a revenue of Rs. 68. The predecessors of the plaintiffs claimed that the settlement of this land should be made by Government with them, but their claim

was disallowed by the revenue authorities and the land was settled, as we have said above, with the defendants' predecessors. Since the year 1884 settlements have been made with the predecessors in title of the defendants and the defendants, down to the year 1920. In 1894 the plaintiffs' predecessors again asked the revenue authorities to settle the land with them, but their prayer was rejected, and they were referred to the Civil Court to establish their title. Both in that year and in 1884 their right to the land now in dispute was challenged by the proprietors of Dhanapur. In 1899 the predecessors of the plaintiffs made an application to the Revenue Court asking that the boundaries should be fixed between the village of Arazi Dayara and the parent village of Dhanapur on the one side, and between Arazi Dayara and the land which had newly emerged which they described as Dayara *jadid*. We may mention that at the time when the revenue authorities settled the land which had re-emerged with the defendants' predecessors, they described the land as Gangbarar Dhanapur, and it is between this Gangbarar Dhanapur and the village of Arazi Dayara, that the predecessors of the plaintiffs asked the Revenue Court to fix boundary pillars. In 1901 there was some litigation in the Revenue Court relating to the payment of rent of land appertaining to the land now in dispute. The predecessors of the plaintiffs claimed to have realized the rent. The revenue authorities held against them and also held that they had no right to this land which had been settled with the ancestors of the defendants. Again, in 1903, disputes arose in the Criminal Court under section 145 of the Code of Criminal Procedure, as to the possession of this land, and the Criminal Court decided in favour of the defendants, maintaining their possession. In 1904 the plaintiffs instituted a suit similar to the present suit, asking for a declaration of their title to the land in dispute. That suit was resisted by the defendants, but the plaintiffs withdrew the suit. It was not until the year 1919 that they instituted the present suit, in which they claim only a declaratory decree. Ever since the year 1884 when their title to the land in question was disputed, they never came to the Civil Court (except in 1904) to establish their right, and it is very reasonably contended on behalf of the respondents that in these circumstances the court ought to be very reluctant to grant a decree for a declaration of right only. There is no evidence on the record to prove at what period the mortgage in favour of the plaintiffs' predecessors was made, but we find

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from the evidence that up to the year 1853 they had no connection with the village of Arazi Dayara. It is only for the first time in the *wajib-ul-arz* for the year 1882 that mention was made of the name of Jagmohan Singh as mortgagee of the village. We have to see whether the mortgage in favour of the plaintiffs' predecessors could be attached to the land now in dispute. Originally the land described as Gangbarar Dhanapur was settled with the defendants. At that time the defendants were owners both of the parent village Dhanapur and of the village Arazi Dayara Dhanapur. Manifestly the land which had appeared in 1853 had become submerged in that year and reappeared in 1884. The area of the culturable portion of the land on both occasions was practically the same. Therefore it may reasonably be presumed that the settlement which was made with the defendants' predecessors in 1884 was a settlement of the same land which had in 1853 been settled with them. At no time during this period had it been recorded as an accretion to the village of Arazi Dayara. In the absence of the mortgage deed which it was the duty of the plaintiffs to produce and prove, it cannot be said whether the land which had appeared in 1853 in front of the village of Arazi Dayara was mortgaged to the plaintiffs' predecessors or could be deemed to be land appertaining to that village. Between 1853 and 1884 the land was under water. In 1881, for the first time, it reappeared and subsequently it reappeared in larger quantities year after year. The learned Subordinate Judge has held that the land accreted to the village of Arazi Dayara and therefore, under the law and the prevailing custom and upon principles of equity, the mortgagees must be deemed to have acquired a right to the additional land thrown up by the river. We are not aware of any law under which the land could be regarded as an accession to the village of Arazi Dayara Dhanapur, unless it was a gradual accretion to the land within the meaning of Regulation II of 1825. It was nowhere alleged in the plaint that the land was a gradual accretion, and it has not been shown that the accretion was in reality gradual. As to usage, the only usage alleged was the custom of *dhardhura*, which admittedly and obviously has no application to the present case. We fail to see upon what principle of equity the plaintiffs can be deemed to have acquired the right to this land. As already stated they asserted their right upon two or three occasions, and on each occasion their right was denied and they took no further steps to have that right established. We are

not satisfied that the plaintiffs have been able to prove that they ever acquired a right to the disputed land as an accession to the village of which they are the mortgagees. On the contrary, by their application in 1899 they seem to have accepted the position that their village was distinct from Gangbarar Dhanapur, that is, the disputed land which they call in their application Dayara *jadid* or the new alluvial land. From these circumstances Mr *Piari Lal Banerji*, on behalf of the defendants, has contended that the plaintiffs' suit should fail on two grounds. First that they have not established their right to the land in question, and, secondly, that even if they had acquired such right, they abandoned the right so far back as 1899 His contention in both respects seems to us to be valid We have not been satisfied that the plaintiffs acquired this land at any time, and it has not been shown that they ever got possession. The evidence is to the contrary and actual possession has always remained with the defendants, except during the short periods that the land was under water in the rainy season As the plaintiffs never acquired the ownership of the land and were never in possession, the rulings of their Lordships of the Privy Council in the case of *Secretary of State for India* v. *Krishnamoni Gupta* (1) and the case of *Basant Kumar Roy* v. *Secretary of State for India* (2) do not seem to have any application to the present case and cannot help the plaintiffs. The conduct of the plaintiffs clearly shows that they acquiesced in the deprivation of any rights which they might have acquired as accessions to their security. This case to some extent resembles the case of *Pratab Bahadur Singh* v. *Gajadhar Bakhsh Singh* (3) and the case of *Khuda Bakhsh* v. *Alum-un-nissa* (4). We do not agree with the learned Subordinate Judge in his conclusion that the land was an accession to the village of which the plaintiffs are mortgagees But we do agree with him that the plaintiffs have lost any right which they may have had, by reason of their not having brought any suit for a declaration of their right within 6 years prior to the institution of the present suit. In these circumstances the appeal must fail. We dismiss it with costs.

Appeal dismissed.

(1) (1902) I. L R , 29 Calc , 518.
(2) (1917) I L R , 44 Calc , 858.
(3) (1902) I L. R , 24 All , 321.
(4) (1901) I L. R., 27 All., 318.

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March, 20.

Before Mr Justice Walsh and Mr. Justice Eyres.

RESHAB DAS (DEFENDANT) v. MUSAMMAT SHEOBAI AND ANOTHER (PLAINTIFFS).*

Act No I of 1872 (Indian Evidence Act), section 108—Presumption of death of person not heard of for seven years—What such presumption actually amounts to—Res judicata.

What the Court may presume under section 108 of the Indian Evidence Act, 1872, is confined to the factum of death. It cannot presume that, because the person has not been heard of, he died at any particular moment, or in any particular way, or from any particular cause. *Muhammad Sharif* v. *Bande Ali* (1), referred to.

In 1907 a Hindu aged 23, having been accused of embezzling money belonging to his employer, disappeared, leaving a childless wife. In 1916, the wife went to law to obtain a decree of adopting a son. The reversioner to her husband's property thereupon sued for a declaration that the adoption was void. That suit failed, because, although the court might be at liberty to presume (and did presume) that the husband was dead at the date of suit, it could not make the further presumption that he was dead at the date of the adoption.

In 1919 the wife made a further attempt to adopt, and on the strength of this adoption filed the present suit for partition of the family property. The court of first instance, considering itself bound by the finding in the earlier suit to hold that the husband had died before 1916, and therefore before the adoption, decreed the claim.

Held on appeal by the defendant that the finding in the former suit as to the date of the husband's death could not amount to a *res judicata*, and that the only presumption which might be made in the present suit was, again, that the husband was dead at the time of the bring of the suit.

THE facts of this case are fully stated in the judgment of WALSH, J.

Babu *Piari Lal Banerji*, Babu *Lalit Mohan Banerji* and Pandit *Shambhu Nath Chaube*, for the appellant.

Dr. *Kailas Nath Katju*, for the respondents.

WALSH, J. :—We have come to the conclusion that this appeal must be allowed and the suit dismissed. The point is a short one, but an interesting one and not so technical and artificial as it appeared at first sight. We are much indebted to Mr. *Piari Lal Banerji* for his able argument on behalf of the appellant. The point may be stated in a very small compass. There is an undoubted mystery about the fate of one Kedar Nath, who was engaged in commercial pursuits. He was a Bania who lived in Calcutta and who, for adequate reasons, namely, that he was accused of embezzlement, disappeared. This happened in December, 1907, that is to say, just a little more than 13 years before this suit. He was only 23. He had no children. He had a young wife, and although feeble efforts have been made to prove his subsequent existence, nothing definite is known about it. If one had merely,

* First Appeal No. 223 of 1920, from a decree of Muhammad Ali Ansar, Subordinate Judge of Aligarh, dated the 18th of May, 1920.

(1) (1911) I. L. R., 34 All., 36.

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on questions of fact, to draw inferences permitted by section 114 of the Evidence Act, many considerations would have to be taken into account, including what has been pressed upon us on behalf of the respondent, that in the case of one who was not shown to have left the country, it is almost certain by now that he is dead. On the other hand, one cannot leave out of account the fact that for many years he had paramount reasons for remaining concealed, that a childless wife is not much esteemed in this country, and that the war which followed 7 years afterwards has altered, one may say, the comparative values of inferences as to the whereabouts of persons whose addresses are unknown. Many Indians have joined, or followed, the troops, and have remained abroad. The Post is far from perfect, as yet. The widow, alleging permission from her husband, a fact which has been rejected by the court below, went through the form of adopting a son in 1916 and the present defendant appellant, being then plaintiff, brought a suit seeking a declaration that the adoption was void The respondent to this appeal, setting up the adoption naturally relied on the presumption, or shifting of the *onus*, defined by section 108 of the Evidence Act. Now, if there is one thing more certain than another, it is that it is clearly established in India, as in England, and particularly expressed in a Full Bench decision in *Muhammad Sharif* v. *Bande Ali* (1), that what the court may presume under section 108 is confined to the factum of death. It cannot presume that, because the person has not been heard of, he died at any particular moment, or in any particular way, or from any particular cause; and that being so, the defence in the former suit was bound to fail, because, the presumption being the sole thing which was relied upon, the court was prohibited by law from finding that Kedar Nath had died before 1915, the date of adoption. It might express an opinion as strongly as it pleased that he was dead at the date of the suit, but, in my judgment, that would be a mere dictum, and even although it framed an issue, and went to the length of holding that he was dead at the date of suit, it would not be an issue as defined by section 11 of the Code Civil Procedure, " substantially or directly in issue " between the parties to that suit. It would be irrelevant, because he might be presumed dead at the date of suit, and yet not dead at the date of the adoption which was the only material question to be decided. Encouraged by the

(1) (1911) I. L. R., 34 All., 36.

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observations of the learned Subordinate Judge, who dealt with the former suit, the widow made a second attempt to adopt, namely on the 18th of June, 1919, and having in her favour, or her advisers thinking that they had in their favour an expression of opinion that the man was dead in 1918 and that, therefore, he must be still dead in 1919, this suit was brought for partition, but not upon the adoption which itself was based upon the alleged decease before June, 1919. The learned Judge in disposing of this second suit, in a very clear judgment, without disputing of the question of fact, has held himself compelled to adopt the theory on which the suit was based, namely, that the issue of death was *res judicata*, that death in the year 1918 had been established in the previous suit, and that, therefore, he was compelled by law to hold that it was proved to have occurred before June, 1919. In this respect we find ourselves unable to agree with him as a matter of law. There is no doubt as to his view. He says: "When once *inter partes* he was presumed to be dead, when the question next arises, he will be presumed to have died when it was decided *inter partes* that he is presumed to be dead." The fallacy in that statement is that there was no decision in favour of the presumption of his death, *inter partes*. There was merely an expression of opinion. The question whether he could be presumed to be dead *inter partes* in that suit was not one which was "substantially or directly in issue within the meaning of section 11 of the Code". We, therefore, think that the decision on the question of *res judicata* was wrong. We feel less hesitation in dismissing the suit, which after all we are bound to do if that is our view, inasmuch as, at any rate in my opinion, this suit is premature, and really an abuse of the process of the court. The respondent's counsel pressed us on the question of fact, namely, that the death was proved. But when one listened to him one realized that he was unable to pursue the argument on the question of fact, without continually grasping the weapon, if I may so describe the presumption, which he professed as frequently to have thrown away That is to say, while at one breath he disclaimed any desire to use the presumption, it found a frequent place in his argument, and necessarily so, because the actual evidence of this man's death is nil, and the surrounding circumstances can only be treated as giving rise to the legitimate inference of fact, greater or less according to the particular opinion of the individual who is asked to draw the inference. I feel it desirable to

express my view about two aspects of this part of the respondent's argument. In the first place, I have no faith in a case which I am satisfied has been run, if I may use the expression, by some legal gentleman propounding a theory. One question is whether this woman either herself thinks, or is entitled to ask a court to think, that her husband was dead in 1919, and her absence from the box and her failure to produce any evidence before the court tending to show that she has latterly regarded herself, and been regarded by her friends and relations, as a widow, is certainly not encouraging to anyone who is asked to draw an inference which might be destroyed in one blow by the re-appearance of this comparatively young man. If she is not prepared to state her reasons for her own belief, it is rather a strong thing to ask the tribunal to do what she appears to shrink from. Secondly, and I am very much impressed by this view of the case, if we were to hold otherwise it seems to me that it would always be possible, in the unusual circumstances which have arisen in this case, for a plaintiff, desirous of benefiting by a presumption of death, to bring a suit, which he or she knows is bound to fail, asking the court to find death at a particular date of the suit, which is admittedly immaterial, and having got a dictum in favour of an immaterial issue in a suit which ought never to have been brought at all, to bring another suit, and to try and force the court to the length of following the presumption which it has already made by an irrelevant dictum in an improper suit. That would amount to an abuse of the process of the court. Three further observations arise which seem relevant. Even if we followed the suggestion of the respondent's counsel, and starting to examine the evidence *de novo* endeavoured to arrive at a decision on the issue of fact, we could then do no more than act on the presumption that Kedar Nath was dead at the date of this suit. The Full Bench decision prohibits us from finding that he was dead before that date. It seems to me, therefore, that a decision would not benefit the plaintiff. I do not think, furthermore, that in the first suit the Judge, who is the same Judge who decided this suit and who is particularly clear in the expression of his reasons, ever intended to say what it is alleged that he did say, namely, that he was satisfied that the man was dead at the date of suit. The sentence relied upon is merely his way, in my opinion, of interpreting section 108 in the English tongue. It should be observed, furthermore, that in the appeal from the judgment

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in the first suit to the District Judge, the question of the correctness or otherwise of the dictum, and its legal effect upon the position of the parties, disappeared altogether, and it ceased to possess any claim to amount to a decision *inter partes*. The Subordinate Judge in his judgment in the first suit said:—"Under section 108 of the Evidence Act the only presumption will be that Kedar Nath is now dead." This seems merely his way of interpreting the presumption which may legitimately be drawn under section 108, viz., that he was dead at the date of the suit and not at any earlier date. Finally I am satisfied that no injustice can be done to the plaintiff by the dismissal of this premature suit. There are methods known to the law by which she can establish the issue of fact in her favour if the strength of her case permits. I think this suit is an indirect attempt to get a decision in favour of the adoption about which her advisers had some qualms. The appeal, therefore, must be allowed and the suit dismissed in all courts with costs. The money deposited by the appellant by way of security will be repaid.

This order is without prejudice to any previous order which we have made providing the conditions imposed upon the re-admission of this appeal, the defendant having been guilty of every possible neglect before he eventually was enabled to bring the matter before this Court.

As an addendum to the foregoing judgment we are asked to state that there is a second point which the appellant, if he had failed upon the point which we have just decided in his favour, desired to raise, namely, that the widow, having no permission from her husband, could not adopt after the estate vested in the surviving member of the joint family. As all the facts are ascertained on that question and, in the event of this case going further and the decision of that question becoming necessary, all the material for its decision is available upon the record, we think we should be serving no public interest by hearing arguments upon it, being of opinion that the suit ought to be dismissed in any case. We are told that the point is a troublesome one.

RIVES, J.:—I agree in the order proposed and generally in the reason stated by my learned brother.

It seems to me that section 108 of the Evidence Act enables a court to shift the burden of proof, that a person who was alive at a given date is still alive, on to the party who

asserts that he is still alive, if he has not been heard of by people who presumably would have heard of his being still alive after 7 years, and if satisfied in the circumstances of the case that he is dead, having regard to the definition of "proof" in section 3 of the Evidence Act, the court may presume and find as a fact that he is dead. But it does not follow that merely because a person has not been heard of for 7 years, where there is no positive or reliable evidence that he is in fact alive, the court must find that he was dead at the date of suit, much less that he was dead at any given particular date. This, I think, is the fallacy underlying the judgment of the court below. I doubt, if even now the wife brought a suit for a declaration that her husband was now dead, whether the court, on the evidence on the record as it stands, (particularly in the absence of any evidence given by the wife) would be justified in holding that the husband was in fact dead. In a case where a man has no ostensible or probable reason to disappear, it might be otherwise. Take a case where a man goes on a voyage in a ship which is never heard of again, or where, as happened in a case within my knowledge in this Court, a man started in a country-boat on ordinary business to cross the Ganges, then swollen and turbulent in flood miles wide, in the rains, and neither he nor the boat was ever heard of again. After seven years of absence, on proper evidence, a court might well act on section 108 and hold the man was dead when the suit was brought. On the other hand, there was another case in this Court where, in my own experience as Government Advocate, a man wanted for murder was unheard of for over 15 years, and thereafter by accident was discovered and arrested in Rangoon, where he had been living all along and prospering Each case must be decided on its facts, having regard to the probabilities of human life and conduct.

What are the facts here? The husband, aged 23, was in business in a *bania's* firm in Calcutta He embezzled his master's money, and to avoid prosecution deliberately absconded, presumably with the money in his pocket. So far as the evidence goes, he has not been heard of since, but is it reasonably probable, from the point of view of the "prudent man", to believe that he is in fact dead? He had every reason to remain "perdu"; there is no limitation against criminal prosecution in India. True, he left behind a young wife. We have no evidence as to whether his relations with his wife were happy

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Ryves, J.

or otherwise. People of his caste are married young, without previous acquaintance usually. We do know that she was childless, and as she must have been married to him for some years, having regard to the habits of the country, and had no child, he may well have despaired of getting a son. For all we know, he may now be prosperous, with a new family in Kenya or East Africa, or Burma, or any of the other places outside India where it is common knowledge that Indian *banias* and pedlars have settled. There is the additional fact that the wife was apparently not left in indigent circumstances, so that there was no stringent obligation on the husband to provide for her support. The learned Judge below has not come to a decision on the merits. As pointed out by my learned brother, he has held that by reason of his previous judgment (which, however, did not decide that the husband was dead then) he was barred by the rule of "*res judicata*" from holding otherwise now. I feel some doubt whether we should not have remanded the case back, but, on the whole, I agree with the order proposed.

Appeal allowed.

Before Mr. Justice Lindsay and Mr. Justice Dando.

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March, 20.

RAM NATH (DEFENDANT) *v.* MANNU LAL AND ANOTHER (PLAINTIFFS).*

Contract—Damages for breach—Agreement to accept rule laid down by a committee of experts for assessing damages in case of breach—Parties not permitted to fall back on the ordinary rules for assessment of damages.

The parties to a contract for the sale of *ghatis* agreed to be bound by the decision of a committee of cloth merchants of the town in which they resided, fixing the scale according to which damages for the breach of such contracts should be computed.

Held that, having accepted this decision, the party damnified (whichever it might be) by a breach of the contract could not, when payment was not made in accordance with the terms thereof, be allowed to fall back on the original contract and claim the larger damages which might have been obtainable thereunder *Manohar Koyal* v. *Thakur Das Naskar* (1) not followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Haribans Sahai*, for the appellant.

Dr. *Surendra Nath Sen*, for the respondents.

* Second Appeal No. 1156 of 1921, from a decree of H. J. Bell, District Judge of Jhansi, dated the 20th of April, 1921, modifying a decree of Khwaja Abdul Ali, Subordinate Judge of Jhansi, dated the 25th of October, 1920.

(1) (1883) I. L. R., 15 Calc., 349.

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RAM NATH v. MANNU LAL.

LINDSAY and DANIELS, JJ.:—After hearing the learned counsel in this case we are of opinion that this appeal should be allowed and that the order of the first court should be restored.

The suit was brought by the plaintiffs respondents to recover a certain sum of money alleged to be due in respect of a contract which was entered into on the 12th of September, 1918, for the delivery by the 18th of November of that year of a bale of *dhotis* at a certain rate.

The date fixed for payment was the 27th of November, 1918.

It is not denied that the goods were delivered to the defendant on the date in question and it is also not denied that the price was not paid on the date fixed for payment.

It appears, however, that after this latter date, inasmuch as there had been much speculation in this class of goods, a committee of the cloth merchants of Jhansi assembled and brought out a plan by which claims for breach of contract of delivery of those goods or for failure to pay the price due in respect of those goods were to be settled.

The decision of this committee was that the dealings should be settled and the goods paid for on the basis of a price of Rs. 5-12-0 per pair of *dhotis* plus half the difference between the price so fixed and the contract price.

Both the courts below have found that the parties to this case submitted to what we may call the award of this committee and agreed that the claim which the plaintiffs had against the defendant should be settled on this basis

The present suit, however has been brought by the plaintiffs on the basis of the old contract, and the question arose as to whether the plaintiffs were entitled to resort to the old contract and to claim damages accordingly. The court of first instance held against the plaintiffs and found that they could only recover on the basis of the scheme which was laid down by the cloth merchants' committee. It was found that if this scheme were enforced, the defendant was liable to pay to the plaintiffs a thousand rupees In appeal the learned District Judge has reversed the decision of the first court He has taken a view of the case which is based upon a decision of the Calcutta High Court, *Manohur Koyal* v. *Thakur Das Naskar* (1) The

(1) (1888) I. L. R., 15 Calc., 319.

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result of this is that he found that although the parties had agreed to be bound by the decision of the committe, nevertheless as the defendant had failed to satisfy the plaintiffs' claim in accordance with the committee's decision, the plaintiffs were entitled to revert to the old contract and to claim damages on a larger scale.

We may mention that the decision on which the learned Judge relies has been dissented from in the case of *N. M. Firm v. Thepernmal Chetty* (1).

For ourselves, we do not think that in the circumstances of this case the plaintiffs were entitled to revert to the original contract. They agreed to accept settlement of their claim for damages on the basis of the scheme which was laid down by the cloth merchants' committee, and we think they ought to be bound thereby. In this view, therefore, the court below was in error in increasing the sum which had been awarded to the plaintiffs by the judgment of the first court. We, therefore, allow this appeal, set aside the decree of the court below and restore the decree of the court of first instance. The appellant is entitled to his costs in the court below and in this Court.

As regards the cross-objections, they have no force and are dismissed with costs.

Appeal allowed.

REVISIONAL CRIMINAL.

1923
March, 22.

Before Mr. Justice Walsh.

EMPEROR v. PANCHAM.*

Criminal Procedure Code, section 250—Frivolous or vexatious accusation—Order for compensation—Notice to show cause not necessary.

It is not a necessary condition precedent to the making of an order for compensation under section 250 of the Code of Criminal Procedure that the Magistrate should issue a formal notice to the complainant to show cause why such order should not be made. *Gulzari Lal* v. *Ganga Ram* (2) distinguished.

THIS was a reference made by the Sessions Judge of Cawnpore. The facts giving rise thereto are fully stated in the order below:

The parties were not represented.

* Criminal Reference No. 173 of 1923.

(1) (1921) I. L. R., 45 Mad., 180.

(2) (1912) 9 A. L. J., 170.

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EMPEROR v. PANCHAM.

Order of reference :—

"The facts of the case, which have given rise to this application, are as follows :—

"Pancham lodged a complaint in the court of the Joint Magistrate, Cawnpore, under section 500 of the Indian Penal Code, against Bechcha, Puttai and Musammat Maharajia. The persons complained against were summoned to answer the charge, and they contended that the complaint was false, baseless and had been brought out of enmity. The charge-sheet was framed against all the accused and defence evidence was taken. Eventually the learned Magistrate who tried the case came to the conclusion that the whole prosecution evidence was utterly false and there was enmity between Pancham complainant and Puttai accused. He accordingly acquitted all the three accused and then ordered Pancham to pay Rs. 20 to each of the accused as compensation, observing in his judgment that he was satisfied that the complaint was a purely vexatious one. It is against this order awarding compensation that this revision has been filed in this court.

"It is contended on behalf of the applicant that the learned Magistrate's proceeding in awarding compensation was irregular and not warranted by law inasmuch as the complainant was not given an opportunity to show cause against the order which the learned Magistrate proposed to pass, which under the provision of section 250 of the Code of Criminal Procedure was imperative, and this omission on the part of the learned Magistrate vitiates the entire proceeding as far as the award of compensation is concerned.

"I have gone through the record and from it I fail to find that the complainant was called upon to show cause as to why he should not be ordered to pay compensation to the accused. I think the contention is well-founded. The proviso of section 250 lays down that "before making any direction for payment of compensation the Magistrate shall record and consider any objection which the complainant or informant may urge against the making of the direction.

"This necessarily implies that the Magistrate should give an opportunity to the complainant to raise any objection which he may have to urge and which may have to be considered before passing the order awarding compensation. It was held in 3 Bom. L. R., 777 and 5 C. W. N., 214, that the provision of law on this point is imperative. In *Gulzari Lal* v. *Ganga Ram*, 9 A. L. J., 170, it was laid down that the order purporting to have been passed under section 250 of the Code of Criminal Procedure was bad inasmuch as no opportunity was afforded to the complainant for objecting to the order. Since, in this case, it appears that no opportunity was given to the complainant for objecting to the order for payment of compensation which the learned Magistrate proposed to pass, this omission makes the order bad in law. The learned vakil for the opposite party contended that the omission on the part of the trial court to call upon the complainant to show cause against passing the order proposed by the learned Magistrate was a mere irregularity covered by section 537 of the Code of Criminal Procedure. He also cited the ruling reported in *Emperor* v. *Angnu Singh*, I. L. R., 45 All., 102. The ruling relied upon by him has no application to the present case, while in view of the clear provision of law and the rulings reported in 3 Bom. L. R., 777 and *Gulzari Lal* v. *Ganga Ram*, 9 A. L. J., 170, I am unable to agree with this contention that this is an irregularity which could be cured by section 537 of the Code of Criminal Procedure. I would, therefore, refer the case to the Hon'ble High Court with the recommendation that the order passed by the learned Magistrate ordering the complainant to pay compensation be quashed."

The following explanation was submitted by the Joint Magistrate, Cawnpore :—

"The only remark I have to make is that none of the accused raised any objection to my order under section 250 of the Code of Criminal Procedure before me. Section 250 of the Code of Criminal Procedure does not say

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that, before passing such order, the Magistrate must call upon the person to show cause why the order should not be made. Section 250 (1) (a) clearly says "record and consider any objection urged. As accused urged no objection, I consequently recorded and considered none. This I understood to mean any objection voluntarily urged."

A further remark of the District Magistrate ran thus:—

"I agree with the Joint Magistrate. I assume that the accused in this case were neither dumb nor imbecile and that had they desired to object they would have done so, and that the Magistrate would have recorded such objection. If so, I cannot see how the law has been infringed."

"Every year the Hon'ble High Court complains that section 250 of the Code of Criminal Procedure is not sufficiently used. The hedging about of this useful section with obstructions is to be deprecated."

The Sessions Judge, Cawnpore, submitted the following further remarks:—

"In submitting the record with the explanation of the learned Joint Magistrate who tried the case, with the remark made by the learned District Magistrate, I beg to submit that it is evident from the view expressed by the learned Joint Magistrate that he had not called upon the accused to show cause why an order directing him to pay compensation should be made. He says that he understood the section to mean that he was only to record and consider any objection which may be voluntarily made by the person who is ordered to pay compensation; but I fail to see how the complainant is to know that in a particular case he will be ordered to pay compensation unless he is given an intimation of the order which the court proposes to pass. He could only show cause if he was given notice about the contemplated order, and as this order was passed when the order of discharge was made, he could not have voluntarily urged any objection as he could not have known about the order till it was passed. So far as I think, clause (a) of the proviso of section 250 of the Code of Criminal Procedure was enacted on the principle that no order should be passed against any person unless he is given an opportunity to urge anything which he may like to do as to the order which is to be passed against him. That he could do only after he was given an intimation of the order proposed to be passed against him, either verbally or in writing. If after that he did not avail of it, he could have no ground for complaint.

"As regards the learned Magistrate's endorsement I beg to submit that there can be no question as to the usefulness of utilizing the provision of section 250 of the Code of Criminal Procedure by awarding compensation, but I do not think that the Hon'ble High Court ever meant by insisting on applying the provision of section 250 of the Code of Criminal Procedure that the provision of that section should be applied without strictly complying with the procedure laid down in that section before passing that order. All that the proviso (a) of section 250 of the Code of Criminal Procedure requires is that the person ordered to pay compensation should be given an opportunity to urge anything which he may have to urge in his defence, so that he may have no occasion to complain that he was condemned unheard, and in order to enable that person to show cause or urge anything on his behalf, he must have some sort of intimation of the order which is proposed to be passed against him. Since the complainant does not appear to have had any intimation of the proposed order in this case, I think the provision of the section was not properly carried out. I do not think that by insisting on carrying out the provision of clause (a) of section 250 of the Code of Criminal Procedure it would amount to hedging about the section. By quashing this order it is not meant that the Magistrate could be precluded from awarding compensation in this case. He would still be at perfect liberty to award compensation after calling upon the complainant to show cause and considering his objection, if he has to make any, and then pass whatever order he may deem just and proper."

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WALSH, J. :—In my view the learned Sessions Judge has taken too technical a view of this matter which, if it is sound, is likely to defeat the ends aimed at by the section. He would have done better to examine the section rather than the cases. He has fallen into a trap in adopting the phraseology that the Magistrate should have " called upon the complainant to show cause." The section does not require anything of the kind, and if anybody has said that he ought to go through any special formality of that kind, I beg respectfully to differ. In these Provinces there is too much " calling upon to show cause " about every trivial question. The section enables the Magistrate to compensate in the case of a frivolous or vexatious accusation, " by the order of discharge ". It only requires any objection which is urged to be recorded and considered. It is clear that this section was not intended to multiply the proceedings but to be applied in a summary manner If the complainant has no real objection to urge, there is nothing to record, as the Joint Magistrate justly remarks Multiplication of proceedings only adds unnecessarily to the burden upon the parties, and in a small matter of this kind where the compensation is Rs. 20 each, it would be obviously a remedy worse than the disease to issue formal notice. A party, moreover, who has the right to make a formal objection and have it recorded can waive that right by his acquiescence. As the District Magistrate says, unless the complainant in this case was dumb or imbecile, there was nothing to prevent his objecting. I am not concerned to consider the decisions in other provinces in a small matter of this sort. The authority quoted by the learned Sessions Judge from the Allahabad Law Journal is inapplicable because the order which was held to be bad was made in the absence of and behind the back of the party against whom it was made The order for compensation must stand. Let the record be returned to the lower court.

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January, 26.

APPELLATE CIVIL.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

GOPI RAM AND ANOTHER (DEFENDANTS) v. JEOT RAM (PLAINTIFF) AND SHEO NATH PRASAD AND ANOTHER (DEFENDANTS) *

Sale—Covenant purporting to create a perpetual right of pre-emption in favour of vendor's heirs. Rule against perpetuities—Act No. IV of 1882 (Transfer of Property Act), section 54—Act No. IX of 1872 (Indian Contract Act), section 37.

Held that a covenant contained in a deed of sale of immovable property, which purported to impose upon the vendee and his representatives indefinitely an obligation, in the event of their wishing to sell the property purchased, to communicate their intention to the vendor or his representatives, and to confer on the vendor and his representatives a right to pre-empt the said property, was void as being in contravention of the law against perpetuities. *Dinkarrao Gangatrao Kothare* v. *Narayan Vishwanath Mandlik* (1), referred to. *Charamadi* v. *Raghavulu* (2), distinguished.

THE facts of this case are fully set forth in the judgment of the Court.

Dr. *M. L. Agarwala* and Dr. *Surendra Nath Sen*, for the appellants.

Munshi *Surendra Nath Varma* (with him Dr. *S. M. Sulaiman*), for the respondents.

MUHAMMAD RAFIQ and PIGGOTT, JJ.:—It appears that one Naram Ram was the owner of a house in the town of Ghazipur, which is the subject-matter of dispute in this appeal. He sold it to one Madhuri Das under a registered deed of sale on the 7th of March, 1894, in lieu of Rs. 275. One of the covenants of the sale was as follows:—

"If the vendee, his heirs or representatives, desired to sell the house purchased, they should, in such a case, first ask the executant, his heirs or representatives for the time being, to purchase it. But if the executant, or his heirs or representatives, refused to purchase, the vendee, his heirs or representatives had a right to transfer it to some one else. That, in case they make breach of this covenant, the executant, his heirs and representatives will be entitled to the specific performance of the contract."

Both the vendor and the vendee are dead. On the 31st of July, 1919, the heirs of Madhuri Das, the vendee, who are represented by the defendants second party, sold the house in question to the defendants first party in lieu of Rs. 700.

On the 28th of June, 1920, the suit out of which this appeal has arisen was brought by Jeot Ram, the son of Narain Ram, for the possession of the house on the payment of Rs. 700. He based his claim on the covenant in the sale-deed

* Second Appeal No. 1143 of 1921, from a decree of J. Allsop, District Judge of Ghazipur, dated the 25th of May, 1921, reversing a decree of Zamrut Islam Khan, Munsif of Ghazipur, dated the 3rd of August, 1920.

(1) (1922) I. L. R., 47 Bom., 191.
(2) (1915) I. L. R., 39 Mad., 462.

of the 7th of March, 1894, recited above, and described his suit as one for specific performance. The claim was resisted on the ground, among others, that the covenant on which the plaintiff relied was bad for remoteness and was not enforceable. The court of first instance dismissed the claim on the ground that the contract sought to be enforced was bad for remoteness, and that the suit being one for specific performance and it being discretionary with the court to grant or refuse specific performance of a contract, the present case was one in which discretion should not be exercised in favour of the plaintiff On appeal by the latter the learned Judge disagreed with the first court and allowed the claim of the plaintiff.

The defendants first party, the vendees of the 31st of July, 1919, have filed the present appeal before us and contend that the covenant giving an option of pre-emption without any limit of time to the vendor, under the deed of the 7th of March, 1894, is void at law and cannot be given effect to. They argue that if the contract relied upon by the plaintiff was merely a personal contract, it could not be enforced against or bind the heirs and representatives of the parties to the original contract On the other hand, if the said contract created a perpetual covenant as to the disposition of the house, such a covenant would be void as contravening the rule against perpetuities. In support of his contention the learned counsel for the defendants has relied upon the following cases :—*Sreemutty Tripoora Soonduree* v. *Juggur Nath Dutt* (1), *Nobin Chandra Soot* v. *Nabab Ali Sarkar* (2), *Nabin Chandra Sarma* v. *Rajani Chandra* (3), *Gurunath Balaji Mutalik Deshpande* v *Yamanava Kom Nalarav Divan* (4) and *Kolathu Ayyar* v. *Ranga Vadhyar* (5). For the plaintiff respondent the argument is that, under the sale-deed of 1894, the contract to re-sell the house to the vendor, his heirs and representatives, was made by the vendee on his behalf and on that of his heirs and representatives at any time whenever the latter wanted to part with the house A contract of sale of immovable property under the Indian law creates no interest in the immovable property, as is clearly laid down under section 54, Act IV of 1882, and if no interest is created in an immovable property

(1) (1875) 24 W R, 321.
(2) (1900) 5 C W N, 343
(3) (1920) 25 C W N, 901
(4) (1911) I L R, 35 Bom, 258.
(5) (1912) I. L. R., 38 Mad., 114.

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under a contract of sale, the latter cannot be vitiated by the rule against perpetuities. The cases cited for the appellants, it is argued, do not apply, as they follow the English law and proceed on the assumption that an option of repurchase reserved to the vendor of an immovable property under a sale made by him creates an interest in that property in his favour There is nothing in the Indian law to confine the enforcement of a contract of sale to the life-time of a contracting party. On the contrary, section 37 of the Contract Act binds the representatives of the promisors also. In justification of his position the plaintiff respondent relies upon the case of *Charamudi* v. *Raghavulu* (1).

After due consideration of the arguments for the parties and the cases cited by them, we think that the contention of the appellants should prevail. The balance of authority seems to be in favour of the case of the appellant The solitary case against him is the Madras case just mentioned above. The facts of the case before us are distinguishable from those of the case of *Charamudi*. In the latter case the plaintiff executed a deed of sale in respect of some land in favour of the managing member of a joint Hindu family. The manager gave a separate agreement on the same day, agreeing to reconvey the land, whenever demanded to do so, on the payment of a certain sum. The plaintiff sued to enforce the agreement. He was met with the objection that as there was no limit of time in which the re-sale was to be made, the agreement for re-sale was void as contravening the rule against perpetuities For the plaintiff the contention was that the agreement was a personal contract and created no interest in land and hence did not offend the rule against perpetuities. It is obvious that in the case of *Charamudi* the dispute was between the contracting parties and not between their representatives. The question whether an agreement, such as that entered into between the parties to the Madras litigation, could bind their heirs and representatives also, was not before the court, nor was it raised at the bar, according to the report of the arguments. The dictum that a contract, under which an option of re-sale is given without any limit of time, can be enforced against the representatives of the contracting parties also, under section 37, Act IX of 1872, was not necessary for the decision of the case of *Charamudi*. The plaintiff respondent, however,

(1) (1915) I. L. R., 39 Mad., 462.

adopts and presses upon us the observations made in the case of *Charamudi* in connection with section 54, Act IV of 1882, and section 37 of Act IX of 1872. As to the last-mentioned section, *i.e.*, section 37, Act IX of 1872, with due deference to the learned Judges who decided the case of *Charamudi*, we think it doubtful whether its provisions enable an owner of an immovable property to enter into an agreement with another, imposing a restrictive covenant for an indefinite period on the disposition of the said property, so as to bind his heirs and representatives. The case-law under that section would not bear out such an interpretation. A somewhat similar case came before the Madras High Court, subsequent to the case of *Charamudi*. The latter case was mentioned and in a way explained. The case is that of *Eagala Nagappa Naidu* v. *Munuswamy Iyer* (1) In discussing the case of *Charamudi*, their Lordships said that the case arose between the parties and the offer was not revoked by the death of the promisor or otherwise. It appears from this remark that the observations made in the former case in connection with section 37 of the Contract Act were neither urged for the appellant nor accepted by the court. As regards section 54 of Act No. IV of 1882, we would refer to the case of *Dinkarrao Ganpatrao Kothare* v. *Narayan Vishwanath Mandlik* (2) The true nature of contracts like the one of 1894 between Narain Ram and Madhuri Das is described by the learned CHIEF JUSTICE in the Bombay case. The learned CHIEF JUSTICE remarked :

"Although contracts for the sale of land which can be specifically enforced immediately, or contracts creating a right of pre-emption which cannot be specifically enforced until the proper occasion arises in the future, do not, according to the law in India, create an interest in land, either equitable or executory, they do create rights which are capable of being enforced with regard to the land in certain circumstances against third parties, and to that extent they are not ordinary personal contracts and stand in a category by themselves The question thus arises whether the principle which underlies the rule of perpetuities, made applicable to this country by section 14 of the Transfer of Property Act, should be applied to this class of contracts" (p 209) . "The law in England and in India is substantially the same with regard to the enforcement of contracts in respect of lands The only difference is that in England the owner of the equitable interest is considered as the owner of the property contracted to be conveyed But no such result can follow from a contract creating an executory interest If such a contract purports to do by indirect means what the law forbids to be done directly, it is void, and the principle is the same in India as in England" (p 210).

We are in accord with those observations of the learned CHIEF JUSTICE and we think that the rule of perpetuities

(1) (1922) 42 M L J , 432
(2) (1922) I L R., 47 Bom., 191.

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applies to the contract of 1891 also. We, therefore, allow the appeal, set aside the decree of the lower appellate court and restore that of the first court by dismissing the claim of the plaintiff respondent. Costs are allowed to the defendants appellants throughout.

Appeal allowed.

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March, 20

Before Mr. Justice Lindsay and Mr. Justice Daniels

RAGHUBIR SINGH AND ANOTHER (DEFENDANTS) v. JODHA SINGH AND ANOTHER (PLAINTIFFS).*

Pre-emption—Property not susceptible of actual possession—Formal possession not required—Civil Procedure Code, order XX, rule 14—Decretal amount consisting in part of money for redemption of a usufructuary mortgage—Effect of the redemption being carried out.

Where the property to which a decree for pre-emption relates is the subject of a usufructuary mortgage and therefore not susceptible of actual possession until the mortgage is redeemed, it is not necessary for the pre-emptor to go through the ceremony of obtaining formal possession of the property. *Sita Ram Pande* v. *Madho Pande* (1), referred to.

Part of the decretal amount being in fact money payable to the mortgagees for redemption of the mortgage, from the time that the mortgage is redeemed the vendees must be considered as in the position of quasi trustees for the pre-emptor.

THE facts of this case are fully stated in the judgment of the Court.

Dr *Surendra Nath Sen* and Pandit *Uma Shankar Bajpai*, for the appellants.

Munshi *Gulzari Lal*, for the respondents.

LINDSAY and DANIELS, JJ. :—This is an appeal in a suit for possession brought by the plaintiffs respondents, Jodha Singh and Dilla Singh. The land in suit originally belonged to one Murat Singh who mortgaged it for Rs. 300 with possession on the 19th of May, 1891, to one Ganga Ram. Ganga Ram remained in possession as mortgagee till the year 1918, but the rights of the mortgagor were the subject of various transfers which it will be necessary to specify.

On the 12th of December, 1903, Murat Singh sold his equity of redemption to the defendants appellants, Raghubir Singh and Gajraj Singh for a sum of Rs. 1,300. Rs. 300 of

* Second Appeal No. 351 of 1921, from a decree of E. Bennet, District Judge of Farrukhabad, dated the 10th of December, 1920, reversing a decree of Rama Das, Subordinate Judge of Farrukhabad, dated the 8th of September, 1920.

(1) (1914) 12 A. L. J., 521

this amount was left with the vendees for payment to the mortgagee, Ganga Ram, to pay off his mortgage One Bharat Singh instituted a pre-emption suit in respect of this sale of the equity of redemption and obtained a decree against the defendants on the 25th of January, 1905 Under this decree the whole of the purchase money, Rs. 1,300, was made payable to the defendants, though Rs. 300 of it was really for payment to the mortgagee Ganga Ram. Bharat Singh, the successful pre-emptor, deposited the entire amount in court within the time allowed by the decree, and the amount was withdrawn by the defendants. As, however, the defendants were not in possession of the property, Bharat Singh did not think it necessary to take out any formal execution of his decree. The contention of the defendants is that Bharat Singh and his successors in interest have lost their entire interest in the property by not doing so

In order to pay the amount of Rs 1,300 under the pre-emption decree, Bharat Singh executed a mortgage in favour of one Meharban Singh The present plaintiffs instituted a pre-emption or pre-mortgage suit on the basis of this mortgage, obtained a decree and stepped into the shoes of Meharban Singh. This was on the 6th of June, 1906 They then sued on the mortgage, brought the equity of redemption to sale and purchased it themselves They have thus succeeded to the rights of Bharat Singh. The mortgage suit was brought in the year 1917, but the plaintiffs did not get formal possession of the property till February, 1919. In the meantime, on the 24th of January, 1918, the defendants had paid off the three hundred rupees due to Ganga Ram under his mortgage and had recovered possession of the property. The plaintiffs, on their purchase being completed, brought the present suit for possession against them

The suit was dismissed by the learned Subordinate Judge on the ground that Bharat Singh not having executed his pre-emption decree, the defendants had been in adverse possession of the equity of redemption for over twelve years. The learned District Judge pointed out that there could be no adverse possession of the equity of redemption under the circumstances, and that as the plaintiffs, or their predecessor Bharat Singh, could not have got possession while Ganga Ram's mortgage subsisted, it was not necessary for them to go through the formality of executing the pre-emption decree He accordingly

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RAGHUBIR SINGH v. JODHA SINGH

decreed the suit. The defendants appeal to this Court and put forward the same contentions which they advanced in the court below. They do not, indeed, now contend that there was any adverse possession of the equity of redemption by them against Bharat Singh. Their contention is that it was absolutely necessary for Bharat Singh to put his pre-emption decree into execution and that, as he failed to do so, his right in the property absolutely ceased at the conclusion of twelve years from the date of his decree.

The respondents rely, among other grounds, on the provisions of order XX. rule 14, which prescribes the form of pre-emption decrees. That rule lays down that the decree shall direct that on payment into court of the purchase price the defendant shall deliver possession of the property to the plaintiff, whose title thereto shall be deemed to have accrued from the date of the payment. It is quite clear that in this case no delivery of possession could take place as the defendants themselves were not in possession. Under the rule, therefore, it must be held that when the plaintiff had complied with the terms of the decree, his title was complete. The same point was considered by a learned Judge of this Court in the case of *Sita Ram Pande* v. *Madho Pande* (1). That also was a case in which no possession could be delivered, the pre-emptor being himself in possession in another capacity. The argument was put forward that unless he applied for formal delivery of possession under order XXI. rule 36, he obtained no right as proprietor in virtue of his decree. That contention was, we think, rightly repelled by the court. In this case, if after complying with the condition of the pre emption decree, Bharat Singh had proceeded to redeem Ganga Ram's mortgage, it is clear that his right to do so could not have been disputed. The reason why he did not do so, almost certainly, was that the portion of the sale price which was specially ear-marked for repayment of this mortgage had been paid by him to the defendants in the pre-emption suit.

The rights of the case are entirely with the plaintiffs. The defendants, having obtained the full price for the property, are now seeking to retain the property as well. The very money with which they redeemed Ganga Ram's mortgage was money left with them for the purpose of redeeming that mortgage. Under these circumstances it is reasonable to hold that, from

(1) (1914) 12 A. L. J., 521.

the time they redeemed the mortgage, they have held possession on behalf of the plaintiffs on the analogy of section 82 of the Indian Trusts Act. On both these grounds we affirm the decision of the court below and dismiss the appeal with costs.

Appeal dismissed.

APPELLATE CRIMINAL.

Before Mr. Justice Ryves and Mr Justice Daniels

1923
March, 22

EMPEROR *v* SHEO CHARAN *

Act No XLV of 1860 (Indian Penal Code), section 412—Possession of stolen property belonging to different owners—Separate convictions

A person found in possession of stolen property identified as belonging to different owners cannot be convicted of several offences of receiving in respect of property identified by each owner, unless there is evidence to prove that they were received by him at different times *Queen-Empress* v *Malkhan* (1), followed

THIS was an appeal from jail from a conviction under section 412 of the Indian Penal Code. The facts of the case sufficiently appear from the judgment of the Court

The appellant was not represented

The Assistant Government Advocate (Mr. *R. Malcomson*) for the Crown.

RYVES and DANIELS, JJ :—Sheo Charan appeals from his conviction under section 412 of the Indian Penal Code The facts found against him are as follows :—

On the 14th of April, 1922, a Sub-Inspector of Police had occasion to search his house with reference to another criminal charge His suspicions were aroused by the condition of a small platform behind an oven in the kitchen and he dug up the place He unearthed a bundle in which were a number of ornaments, some broken up and some intact. It was subsequently ascertained that one of these articles, on which this charge is based, was stolen in a dacoity which took place at the house of Musammat Dhanpatia in the village of Marwatia, on the 30th of December, 1921. There is further evidence that this dacoity in Marwatia was committed by the same gang that committed another dacoity, at about the same time, in the

* Criminal Appeal No 139 of 1923, from an order of Brijnath Das Second Additional Sessions Judge of Gorakhpur, dated the 20th of January, 1923.

(1) (1893) I L R , 15 All., 317

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village of Ganwaria, and it has been satisfactorily proved that some of the ornaments found in the same bundle were taken in that dacoity. Sheo Charan had already been put on his trial and convicted under section 412 of the Indian Penal Code in connection with the articles stolen at the Ganwaria dacoity and was sentenced to five years' rigorous imprisonment.

He has now been put on his trial for being in dishonest possession of this particular ornament knowing or having reason to believe that it was stolen in a dacoity. In our opinion Sheo Charan cannot, on the evidence adduced in this case, be convicted separately with regard to this particular ornament. There is no evidence that it was received by him on a different occasion to the ornaments which were stolen in the Ganwaria dacoity. Both the ornaments were found in the same bundle hidden at the same place. The case of *Queen-Empress* v. *Makhan* (1), which followed an earlier Calcutta decision, *Ishan Muchi* v. *The Queen-Empress* (2), is authority for the proposition that a person found in possession of stolen property identified as belonging to different owners cannot be convicted separately in respect of property identified by each owner, unless there is evidence to prove that they were received by him at different times.

We have been asked by the learned Assistant Government Advocate to dissent from this case, but we are not prepared to do so. It has stood unchallenged for nearly thirty years and has been treated as laying down the law by which the courts should be guided. On principle, also, we consider that the ruling is correct. The essence of an offence under section 411 or 412 is the act of receiving or retaining stolen property. If a thief hands over to the accused a bundle containing a number of articles, the offence committed by the accused in receiving those articles is a single offence and not a number of offences, and it makes no difference whether the articles belonged to a single owner or to different owners. If there were evidence that the accused received the articles at different times or from different persons, the case would be different, but the court cannot presume this against the accused in the absence of any evidence.

(1) (1893) I. L. R., 15 All., 317.
(2) (1886) I. L. R., 13 Calc., 511.

APPELLATE CIVIL.

1923
March, 22

Before Mr Justice Muhammad Rafiq and Mr Justice Lindsay.

ZIA-UD-DIN (PLAINTIFF) v. ABUL HASAN AND ANOTHER (DEFENDANTS).*

Pre-emption—Muhammadan law—Shafi-khalit—Pre-emptor and vendee both standing in the same relation as regards the property sold

Where in a suit for pre-emption based on the Muhammadan law both the vendee and the pre-emptor stand on an equal footing as *shafi-khalit* in the same degree, the pre-emptor is entitled to a decree for one-half of the property sold *Muhammad Yakub* v. *Kanhai Lal* (1), followed

THE facts of this case are fully set forth in the judgment of the Court

Maulvi *Iqbal Ahmad* (with him Dr *S. M. Sulaiman* and Maulvi *Mukhtar Ahmad*), for the appellant

Mr. *Ibn Ahmad* for the respondents

MUHAMMAD RAFIQ and LINDSAY, JJ. :—It appears that Maulvi AZIZ-UD-DIN was the proprietor of a grove situate in the city of Budaun The maulvi died some time ago, leaving him surviving three sons and a daughter by one wife and one son by another wife The latter was called Muhammad Abul Hasan and was in judicial service in Hyderabad. The names of the children by the first wife were Wahab-ud-din, Wahaj-ud-din, Zia-ud-din and Musammat Afzal-un-nissa. Some years ago Afzal-un-nissa sold her share to Abul Hasan On the 2nd of November, 1920, Wahab-ud-din sold his share in the grove to Abul Hasan in lieu of Rs 220. Zia-ud-din, the own brother of the vendor, brought the suit out of which this appeal has arisen against the vendor and the vendee to recover the share sold, on the ground of pre-emption It was alleged in the plaint that after the death of M. Aziz-ud-din the children by the first wife gave his share to Abul Hasan, the son by the second wife, and separated from him. The plaintiff Zia-ud-din was employed in Government service at Ahgarh, when his brother Wahab-ud-din executed the sale deed of his share in the grove on the 2nd of November, 1920, in favour of Abul Hasan On the 10th of November, 1920, when Zia-ud-din went home he learnt of the sale. Immediately on coming to know of the sale he made the two demands required by the Muhammadan law, and, as the vendee declined to transfer the share to him the present suit had to be brought. The claim of the plaintiff

* Second Appeal No. 1289 of 1921, from a decree of O. F. Jenkins, District Judge of Budaun, dated the 2nd of July, 1921, confirming a decree of Zorawar Singh, Munsif of East Budaun, dated the 8th of April, 1921

(1) (1921) I. L. R., 44 All., 83

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was based on the allegation that a custom of pre-emption obtained in the city of Budaun under which he, as the own brother of the vendor, had a preferential right over the vendee. Another basis of the claim was that under the Muhammadan law, apart from any custom, the plaintiff, being the *shafi-khalit* had a better right of purchase than the vendee. The claim was resisted by the denial of the custom set up in the plaint and of the allegation of the plaintiff being a *shafi-khalit*. It was pleaded for the defence that there had been a partition of the grove among all the children of M. Aziz-ud-din, each of them being in possession of his or her separate share. The plaintiff therefore had no better right to the property in suit than the vendee. The court of first instance dismissed the claim, holding that all the children of M. Aziz-ud-din had divided the grove prior to the disputed sale; that no custom of pre-emption obtained in Budaun, and that the plaintiff was not a *shafi-khalit*. On appeal the learned District Judge upheld the decree of the first court.

In second appeal before us the plaintiff challenges the finding of the court below with regard to the absence of the custom of pre-emption in Budaun and the status of the plaintiff as not being a *shafi-khalit*. The finding of the court below with regard to the partition of the grove in question is admitted, and indeed it could not be denied as the finding is one of fact. The learned counsel for the plaintiff appellant has read to us the paragraph of the wajib-ul-arz upon the basis of which he contends that a custom of pre-emption prevails in Budaun. We have duly considered the language of that paragraph and we agree with the court of first instance that it does not prove the custom set up on behalf of the plaintiff. The real dispute in the case is as to the status of the plaintiff as owner of part of the grove, i.e., whether he is a *shafi-khalit*. The case for him is that the vendee has got either a house or a *bagia*, as is marked on the plan to the east of the grove in question. On account of his ownership of the said property he has a right of way over those portions of the grove which have fallen to the lot of the plaintiff and his two brothers. The share of the vendor therefore bears a servitude, i.e., the liability to be walked over by the vendee. The same servitude is borne by the share of the grove of the plaintiff. In other words, the statement is that the vendee is the owner of a dominant tenement while the pre-emptor and the vendor are the owners

of two servient tenements. There is therefore a bond of union between the vendor and the plaintiff, as both of them are the owners of servient tenements and thus the plaintiff is a *shafi-khalit* and has a superior right to purchase the share of the vendor to the vendee. The obvious reply to this argument is that *quâ* the share of the vendor both the pre-emptor and the vendee are owners of dominant tenements, for it appears from the plan on the record marked Ex. A. and the evidence on the record that, in order to get to his portion of the grove or away from it, the plaintiff has to pass through the share of the grove that belongs to the vendor which was sold on the 2nd of November, 1920. The vendee has also to pass over the same portion of the grove of the vendor. Thus both the pre-emptor and the vendee are, *quâ* the share of the vendor, proprietors of dominant tenements. It is, however, argued that the vendor's share of the grove is a servient tenement *quâ* the vendee as proprietor of the property to the east of the grove, and the vendee is not an owner of any servient tenement. The plaintiff pre-emptor has a bond of union with the vendor inasmuch as his share and the vendor's share are both burdened with the servitude of the right of way in favour of the vendee. The plaintiff pre-emptor has, it is true, an additional right, *viz.*, the right of passing over the property sold He has thus a two-fold right to describe himself as a *shafi-khalit*. The vendee, on the other hand, can base his claim to purchase on one right only, *viz* , that of being the owner of a dominant tenement. We think that the contention is not quite correct The vendee stands in the same position as the pre-emptor. The vendee purchased the share of Afzal-un-nissa some years prior to the disputed sale. The share of Afzal-un-nissa adjoins the share of the vendor on the west side. That portion of the grove which the vendee purchased from Afzal-un-nissa also bears the servitude of the right of way in favour of the plaintiff pre-emptor The vendee can say that he also is the owner of a servient tenement i e , his property bears the same burden as the property that has been sold to him and is now in dispute We thus find that both the plaintiff pre-emptor and the vendee stand in the same degree, whether as owners of dominant tenements or as owners of servient tenements in respect of different portions of their properties. The contention for the plaintiff appellant is that if this Court is of opinion that he and the vendee stand in the same degree, the property in dispute ought

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to be divided between him and the vendee. We think this contention is correct and is supported by authority: *Mukammad Yakub* v. *Kanhai Lal* (1). We therefore allow the appeal, set aside the decrees of the courts below and decree the claim of the plaintiff appellant to half the property sold on the 2nd of November, 1920, on the payment of Rs. 110 within two months from the date of the decree of this Court. As to costs, parties will bear costs in proportion to failure and success throughout. In case the money is not deposited within two months from the date of the decree of this Court, the claim of the plaintiff will stand dismissed with costs throughout.

Appeal allowed.

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March, 23.

Before Mr. Justice Muhammad Rafiq and Mr Justice Lindsay.

SITA RAM TIWARI (DEFENDANT) v. FAUJDAR RAI (PLAINTIFF) *

Pre-emption—Wajib-ul-arz—Construction of document—Custom or contract.

In a pre-emption suit based upon the village papers, where the record which is relied on for the purpose of proving custom contains a number of extraneous matters, some of which [illegible] have reference to a contract entered into between the parties, and which could not possibly be based on custom, then it ought to be taken that the whole [illegible] not properly a record of custom at all. *Sarajbali* v. *Muhammad Nasir* (2), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit Uma Shankar Bajpai, for the appellant

Munshi *Haribans Sahai*, for the respondent.

MUHAMMAD RAFIQ and LINDSAY, JJ.:—The question raised in this second appeal is whether the custom of pre-emption upon which the plaintiff relied was proved.

The only document put forward in proof of this custom was a *wajib-ul-arz* which was prepared in the year 1909, after a partition had taken place in the village. It seems to be the case that when partition is made it is the duty of the Collector or Assistant Collector to prepare a fresh record of rights. This, as is pointed out by the learned counsel for the respondent, was laid down in the case reported in I L. R., 22 All., 1.

We take it, therefore, that this *wajib-ul-arz* prepared in the year 1909 can be looked at for the purpose of ascertaining whether it records a custom.

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* Second Appeal No. 1441 of 1921, from a decree of J. Allsop, District Judge of Ghazipur, dated the 30th of June, 1921, confirming a decree of Umed Singh, Munsif of Rasra, dated the 14th of September, 1920.

(1) (1921) I L. R., 44 All., 83

(2) (1918) 16 A. L. J., 879.

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The argument on behalf of the defendant appellant is that on the language of this document the courts ought not to hold that there is a record of custom but merely a record of contract, and in this connection reference is made to what was laid down in the case of *Surajbali* v. *Mohammad Nasir* (1).

There can, we think, be no doubt that if the principles laid down in this case are to be followed, then we ought certainly to hold that this document now before us is not a record of custom In that case it was pointed out that where the record which is relied upon for the purpose of showing custom contains a number of extraneous matters, some of which could only have relation to a contract entered into between the parties and which could not possibly be based upon custom, then it ought to be taken that the whole *wajib-ul-arz* is not properly a record of custom at all. We have followed this case in many other cases recently decided.

Turning to the document now before us, we find that Chapter II of this *wajib-ul-arz* is headed as follows :—" *Hissadaran ke apas ke huquq ya yo rasm muahida khas par mabni hon* " The 16th paragraph of this Chapter relates to pre-emption. It also deals with other matters, including the procedure to be observed when mortgages are to be redeemed, and it distinctly gives a right to a co-sharer to redeem a mortgage made by another co-sharer who is unwilling or unable to ask for redemption at the time when redemption becomes due It is set out there that another co-sharer may redeem and hold the property under charge until it is redeemed by the co-sharer who made the mortgage.

We cannot in principle distinguish this case from the case to which we have referred, viz , *Surajbali* v. *Mohammad Nasir* (1), and we consequently hold that the record relied on in this case is not a record of custom

It has been argued before us that this point cannot be debated in second appeal inasmuch as the question was not raised before the learned Judge of the lower appellate court In the grounds of appeal which were taken in that court the first ground was that the custom of pre-emption, on the basis whereof the plaintiff sues, is not proved from any reasonable evidence. The judgment of the learned Judge seems to indicate, however, that this point was not debated before him and

(1) (1918) 16 A. L J., 879.

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his judgment shows that the only point which was argued before him was with regard to the interpretation of the preferential right of the co-sharers *inter se*. Be that as it may, it seems to us that the defendant appellant is not precluded from asking us to hold, on the basis of the decisions of the Pre-emption Bench, that the language of this document does not show that what was recorded was a true record of custom. We therefore allow the appeal, set aside the decree of the court below and direct that the claim of the plaintiff be dismissed. The defendant appellant will be entitled to his costs in all three courts.

Appeal allowed.

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March, 28.

Before Mr. Justice Muhammad Rafiq and Mr. Justice Piggott.

BALLI SINGH (DEFENDANT) *v.* RAGHUBAR SINGH (PLAINTIFF) AND SHEO NATH RAI AND OTHERS (DEFENDANTS).*

Pre-emption—Wajib ul arz—Permanently settled village—Contract—Custom not subsisting after the death of the signatories of the wajib-ul-arz.

Where the rule of pre-emption recorded in a *wajib-ul-arz* of a permanently settled village is a matter of contract and not of custom, it cannot be applied to a transfer executed after the death of the signatories to such contract. *Dinkarrao Gangatrao Kulkarni v. Narayan Vishvanath Mandlik* (1), referred to. *Charanudi v. Raghavulu* (2), not followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. *Kailas Nath Katju* and Munshi *Badri Narain*, for the appellant.

Dr. *Surendra Nath Sen*, for the respondents.

MUHAMMAD RAFIQ and PIGGOTT, JJ. :—The two appeals Nos. 936 and 937 of 1921 arise out of two suits in which the pre-emptor is one and the same person. Both of them raise the same points and were disposed of by one judgment by the learned Judge of the lower appellate court. We propose to dispose of both the appeals by this judgment. It appears that Sheonath Rai, Ram Shankar Lal and Dharam Govind were co-sharers in the village of Dilwanspur in the district of Mirzapur, and they executed two sale-deeds on the 31st of October, 1919, in favour of three persons. One sale-deed was executed in favour of Chhedi and Gursaran in lieu of Rs. 2,780 in respect of a portion of the property owned by the vendors, and

* Second Appeal No. 936 of 1921, from a decree of B. J. Dalal, District Judge of Allahabad, dated the 30th of March, 1921, confirming a decree of R. Milner-White, Subordinate Judge of Mirzapur, dated the 21st of December, 1920.

(1) (1922) I. L. R., 47 Bom., 191.

(2) (1915) I. L. R., 39 Mad., 462.

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the other deed of sale was executed in favour of Balli Singh by the same vendors in respect of another item of property in lieu of Rs 1,853 Raghubir Singh, who is a co-sharer in the village, instituted two suits, out of which these two appeals have arisen, for the recovery of two items of property conveyed by the deeds of the 31st of October, 1919, by right of pre-emption. It was stated in the plaint that the custom of pre-emption prevailed in the village. During the pendency of the two suits in the court of first instance, the status of two persons at least was changed, Balli Singh succeeded in getting a deed of gift in his favour in respect of a certain item of property in the same village, and Raghubir Singh, the pre-emptor, was appointed lambardar of the village, prior to the decrees of the first court. Both parties gave evidence in support of their respective allegations. The learned subordinate judge, who tried the two suits, came to the conclusion that the plaintiff pre-emptor had failed to prove his allegation of custom. The learned judge, however, found that the revenue paper which he describes as wajib-ul-arz of 1290 F , i.e., 1883, and which was signed by all the co-sharers, contained a covenant with regard to pre-emption He, therefore, enforced the terms of the wajib-ul-arz as a contract binding not only upon the signatories to the contract but upon their heirs and representatives also. The claim of Raghubir Singh was decreed in both the suits. On appeal the learned District Judge affirmed the decrees of the first court

In second appeal before us it is contended by the vendees that the wajib-ul-arz of 1290 F , i e , 1883, if a record of contract, would not bind the heirs and the legal representatives of the signatories of that document. It appears that the village of Dilwanspur is permanently settled. There was no settlement in 1883 but there was a revision of records At the time of the revision of records a statement was made by the co-sharers at that time that they would give each other preference in case of transfer over a stranger. The village being permanently settled, no time is fixed for the revision of records. No revision has taken place up to this time since 1883. The contention for the vendees appellants is that if the document of 1883 was a contract between the signatories to that document, the contract expired with their deaths. On the other hand, if it be said that the signatories to that document entered into a covenant which would bind them and their heirs and legal

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representatives for an indefinite period, such a covenant is bad in law as it contravenes the rule of perpetuities. Various authorities have been cited in support of this contention, namely, *Sreemutty Tripoora Soondaree* v. *Juggar Nath Dutt* (1), *Nobin Chandra Seal* v. *Nabab Ali Sarkar* (2), *Nabin Chandra Sarma* v. *Rajani Chandra* (3), *Gurunath Balaji Mutalik Deshpande* v. *Yamanava Kom Nalavar Divan* (4) and *Kolathu Ayyar* v. *Ranga Vadhyar* (5). On behalf of the respondent pre-emptor reliance is placed on the case of *Arula Charamudi* v. *Marribogina Raghavulu* (6). The observations of the learned Judges in the latter case are relied upon by the learned counsel for the pre-emptor in support of his contention that the contract embodied in the document of 1883 is binding upon the present co-sharers of the village. The balance of authority appears to us to be on the side of the vendees, i.e., the appellants before us. We cannot do better than to reproduce here the observations of the learned CHIEF JUSTICE of Bombay made in the case of *Dinkarrao Gangatrao Kothare* v. *Narayan Vishwanath Mandalik* (7), which were as follows:—

"Although contracts for the sale of land which can be specifically enforced immediately or contracts creating a right of pre-emption which cannot be specifically enforced until the proper occasion arises in the future do not according to the law in India create an interest in land either equitable or executory, they do create rights which are capable of being enforced with regard to the land in certain circumstances against third parties, and to that extent they are not ordinary personal contracts and stand in a category by themselves. The question thus arises whether the principle which underlies the rule of perpetuities made applicable to this country by section 14 of the Transfer of Property Act should be applied to this class of contracts" (p. 206). . . . "The law in England and in India is substantially the same with regard to the enforcement of contracts in respect of lands. The only difference is that in England the owner of the equitable interest is considered as the owner of the property contracted to be conveyed. But no such result can follow from a contract creating an executory interest. If such a contract purports to do by indirect means what the law forbids to be done directly, it is void and the principle is the same in India as in England" (p. 210).

We accept these observations as correctly describing the nature of the contract which is the subject-matter of discussion in the present appeals. We are, therefore, of opinion that the contract mentioned in the wajib-ul-arz of 1883, upon which reliance is placed by the courts below in discussing the claim of the plaintiff pre-emptor, is not one which can be enforced

(1) (1876) 24 W. R., 321.
(2) (1900) 5 C. W. N., 343.
(3) (1920) 25 C. W. N., 901.
(4) (1917) I. L. R., 36 Bom., 268.
(5) (1912) I. L. R., 38 Mad., 174.
(6) (1915) I. L. R., 39 Mad., 462.
(7) (1922) I. L. R., 47 Bom., 191.

now We, therefore, allow the two appeals, set aside the decrees of the courts below and dismiss the claim of the plaintiff pre-emptor with costs throughout.

Appeal allowed.

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REVISIONAL CRIMINAL.

Before Mr Justice Reves.

EMPEROR v. SHIMBHU NARAIN.*

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Act No XLV of 1860 (Indian Penal Code), sections 52, 88 and 92— "Good faith"—Unlawful confinement—Unnecessarily harsh treatment of a lunatic

One *SN*, a person of means and education, living in a large town where medical assistance was readily obtainable, had a brother who was subject to insanity of an intermittent kind When the fits were upon him he was dangerous He fell into such a fit about the end of March, 1922, and *SN* then proceeded to have him chained up with heavy chains, and kept him so until the 3rd of July, when the matter was brought to the notice of the District Judge, who ordered his production The lunatic was brought before the Judge in the same fetters in which he had been confined, and, being examined by two medical practitioners was then found to be sane A charge under section 344 of the Indian Penal Code was brought against *SN* and he was convicted

Held that in the circumstances *SN* could not be held to have acted in good faith so as to be entitled to the benefit of sections 88 and 92 of the Indian Penal Code.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr *C. Ross Alston* and Mr *P N Sapru*, for the applicant

The Assistant Government Advocate (Mr. *E. Malcomson*), for the Crown.

REVES, J —This is an unusual case. Shimbhu Narain was convicted by a Magistrate of the first class under section 344 of the Indian Penal Code and sentenced to one day's detention till the rising of the court, and a fine of Rs 200 His appeal was dismissed by the learned Sessions Judge of Farrukhabad and he comes here in revision The facts are not disputed

Shimbhu Narain is a wealthy zamindar and an honorary magistrate in the town of Kanauj. The charge against him is that of having wrongfully confined his brother Maheshwar Narain, for more than ten days, in fact, from the 29th of March until the 3rd of July, 1922. It appears that Maheshwar Narain is subject to fits of insanity, and, on such occasions,

* Criminal Revision No 124 of 1923, from an order of E C Forbes, Sessions Judge of Farrukhabad, dated the 15th of December, 1922.

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exhibits dangerous and violent tendencies. On or about the 29th of March he certainly became very violent and went about brandishing a sword and threatening to do violence to people. I think there is no doubt that on that date he was insane, and dangerously so. Shimbhu Narain had him chained up with very heavy chains and kept him in that condition until the 3rd of July, when, the matter having been reported to the District Judge, Shimbhu Narain was called upon to produce Maheshwar Narain before him. He did so and brought him to court chained in the same fetters in which he had been confined. An examination of Maheshwar Narain's mental condition was then made by two medical practitioners and he was certified to be then sane. These facts are admitted.

It is argued that Shimbhu Narain was justified in what he did and that he acted honestly. As evidence of his honesty, attention is drawn to the fact that he produced Maheshwar Narain before the District Judge in the very fetters with which he had been chained. Both the lower courts have held that the manner in which Maheshwar Narain was chained was unnecessarily cruel. This, it is argued, is irrelevant and does not affect his guilt. In my opinion, although the matter has not been considered in the same light by the courts below, it is relevant on the question of the "good faith" of the accused. The accused relies on sections 88 and 92 of the Indian Penal Code as justification. The learned Sessions Judge has rightly held that an accused person who desires the benefit of this or any of the other exceptions in the Code must prove that he comes within its scope, and that the accused has failed to do so. Under both sections 88 and 92, the accused person must show that he acted in good faith. Now "good faith," for the purposes of those sections, is explained by section 52 of the Code which says, "nothing is said to be done in good faith which is done without due care and attention." The evidence shows that although Maheshwar Narain is subject to fits of violent insanity, nevertheless he has lucid intervals. It seems, in fact, that these fits only come on occasionally and are temporary. Under these circumstances, having regard to the fact that the accused is a person of education and wealth and that he lives in a town where medical attendance could easily be procured, he cannot be said to have acted with due care and attention in chaining up his brother in this unnecessarily cruel way for over three months, and apparently he would have continued so to

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confine him indefinitely if the District Judge had not interfered. If the definition of "good faith" as given in the General Clauses Act, Act X of 1897, which says "a thing shall be deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not," had been applicable, there might have been some force in the argument of the learned counsel for the applicant, although even then I am doubtful whether the accused, having regard to his position in life, could be entirely exonerated In my opinion the conviction is right I decline to interfere.

Conviction upheld.

APPELLATE CIVIL.

Before Mr Justice Ryves and Mr Justice Daniels.

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NANDAN PRASAD AND ANOTHER (DEFENDANTS) v. ABDUL AZIZ AND ANOTHER (PLAINTIFFS).*

Hindu law—Hindu widow—Property which was really joint family property bequeathed to widow—Property mortgaged by widow but for benefit of sons—Mortgage not binding on sons

A Hindu died leaving three sons He also left a will, by which he purported to bequeath certain property, which was joint ancestral property, to his widow The widow mortgaged the property, not as guardian of her minor sons, but as full owner, although the money so raised was employed for the benefit of the sons The mortgagees sued on their mortgage, and the two surviving sons (one being then of age and the other a minor) asked to be made, and were made, parties to the suit

Held that the sons could not be in any way affected by the mortgage executed by their mother. *Baluant Singh* v *Clancy* (1), referred to

THE facts of this case are fully set forth in the judgment of the Court.

Munshi *Shiva Prasad Sinha*, for the appellants, submitted that the mortgage was absolutely void because Musammat Soman did not make it as the manager of the family or as representing the minors She clearly said that the property was hers under the will. On the finding that the property was ancestral, the will fell to the ground He relied upon *Baluant Singh* v *Clancy* (1).

The finding that the money was taken for legal necessity, in fact for the maintenance of the minor sons, might create a moral obligation but not a legal one In the mortgage the

* Second Appeal No 140 of 1922, from a decree of H. L Yorke, Second Additional Judge of Gorakhpur, dated the 4th of November, 1921, confirming a decree of Raghunath Prasad, Additional Munsif of Gorakhpur, dated the 31st of January, 1921

(1) (1912) I L R, 34 All, 296 L R, 39 I A, 102

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mother said that the property belonged to her and that they had nothing to do with it. That amounted to an assertion of adverse title. Naturally she might not have any adverse interest but when she *did* use that language she did assert adverse title, even though unconsciously. It was a mere chance that they (appellants) succeeded in proving the property ancestral. If they had failed to do that, even the right of redemption would have been lost to them because, on the finding, they would have had no interest in the property. A *de facto* guardian was no better than an unauthorized guardian: *Mata Din* v. *Ahmad Ali* (1).

There being thus no legal obligation, moral considerations should not arise: *Ram Tuhul* v. *Bisweswar* (2).

The principle of *Kashi Prasad Singh* v. *Akleshwari Prasad Narain Singh* (3) also applied.

Mr. *Hamid Hasan*, for the respondents, submitted that the mother as the natural guardian had a right to mortgage. He relied upon *Hunoomanpersaud Panday* v. *Moomraj Koeri* (4) and *Ram Charan* v. *Mihin Lal* (5). The defendants' own mother having taken the money and every pice having been spent upon them, they were liable for it.

Munshi *Shiva Prasad Sinha* was called upon to reply.

RYVES and DANIELS, JJ.:—The facts out of which this appeal arises are as follows:

The property in suit belonged originally to one Sheo Charan. He died leaving a son Sital. Sital had three sons, Debi, now dead, Nandan and Sheo Nandan. On the 6th of August, 1906, Sital made a will in favour of his wife Musammat Somari of the property in suit and died soon after its execution. On the 16th of August, 1908, Musammat Somari mortgaged the property in favour of the wife of the plaintiff. This suit was brought by the heirs of the mortgagee to recover the amount then due under the mortgage, by sale of the mortgaged property, and it was brought against Musammat Somari alone. In the plaint she is described as the mortgagor and there is no mention of her sons. Subsequently, on the application of Nandan Prasad for himself and as guardian of his minor brother Sheo Nandan, they were brought on the record as

(1) (1912) I. L. R., 34 All., 213, (222)
(2) (1874) L. R., 2 I. A., 131, (143).
(3) (1920) 58 Indian Cases, 22.
(4) (1856) 6 Moo. I. A., 393
(5) (1914) I. L. R., 36 All., 158

defendants and they alone defended the suit They denied the execution of the deed or that there was consideration In their written statement they said that Musammat Somari had no legal right to mortgage the house and that she had no claim whatever in it In the mortgage-deed the will is recited, and Musammat Somari claims to be in full proprietary possession of the property under the will, and as owner she purports to mortgage the property for a sum of Rs 250 for the payment of "miscellaneous debts and other needs" There is no mention in the deed itself that the money was required for the use of the minors

The mortgage was executed by Musammat Somari claiming to be sole owner of the property under her husband's will The suit also was brought on this basis against Musammat Somari alone Nandan and Sheo Nandan, the two younger sons of Sital, asked to be joined in the suit on the ground that the property belonged to them and not to their mother In other words, they claimed a title paramount to that of the mortgagor. Under these circumstances the trial court might well have refused to allow them to be joined or to allow the title of the mortgagor to be brought into controversy, as against third parties, in a mortgage suit. This course was, however, not adopted The courts below have found that the will was invalid, and that Musammat Somari had no title to the property They have nevertheless allowed the suit on the ground that Musammat Somari was the *de facto* guardian of her minor sons and that the transaction was for legal necessity That Musammat Somari was not the legal guardian of the minors was admitted The family was a joint family, and they had an elder brother. Debi Prasad, who was the head of the family

On the facts found by the court below no question of legal necessity ever arose in the case at all It is elementary law that one person cannot be bound by the act of another unless it is done in a representative capacity, either as agent or guardian or in some similar capacity Here Musammat Somari purported to be dealing as of right with property which was her own It being found that the property was not hers, any dealings with it on her part are *ipso facto* void, and questions, as to the motives which induced her to execute the mortgage, or what she did with the purchase-money, are entirely irrelevant If any authority is needed for this proposition it may be found in the decision of their Lordships of the Privy

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Council in the case of *Baluant Singh* v. *Clancy* (1). In that case a mortgage was executed by one Sheoraj Singh who declared that he was the absolute owner in possession of the mortgaged property and that there was no co-sharer therein, and on this footing purported to mortgage it to the Bank of Upper India. In fact the property was the joint property of Sheoraj Singh and his younger brother, Maharaj Singh. Maharaj Singh did not join in the mortgage nor did it appear by the mortgage-deed that he had any proprietary interest in the mortgaged property. He was, however, induced to sign the mortgage-deed to afford evidence that he had assented to the taking of the loan by Sheoraj Singh and to the granting of the mortgage. A suit was brought on the mortgage against both brothers and was resisted by Maharaj Singh on the ground that he was a minor at the time of the execution of the mortgage and that the deed was not binding on him. The question of his minority was material on the plea that though he had not joined in the mortgage, he had assented to it. The courts in India found that he was a minor and dismissed the suit as against him. In appeal to the Privy Council it was sought to make him liable on the ground that Sheoraj Singh was his *de facto* guardian and that the mortgage was executed in lieu of antecedent debt, and their Lordships of the Privy Council observed :—

> "Having found as a fact that Maharaj Singh was a minor on the 28th of October, 1892, it is not necessary for their Lordships to consider any other issue. This suit has been brought on the mortgage-deed of the 28th of October, 1892, by the assignee of that mortgage, and as their Lordships have held that the mortgage was not made by Sheoraj Singh as the manager of the family or in any respect as representing Maharaj Singh, and as Maharaj Singh was then a minor, the mortgage-deed as against him and his interest in the estate was not merely voidable; it was void and of no effect, and must be regarded as a mortgage-deed to which he was not even an assenting party and as a mortgage-deed which did not affect him or his interest in the estate."

In the same way, in the present case the answering defendants were minors at the execution of the mortgage and there is no question of their having assented to it. The mortgage was not made by Musammat Sonari as representing the family estate or in any respect as representing the appellants. As against them and their interests the mortgage-deed is, therefore, not merely voidable; it was void and of no effect, and was a mortgage-deed which did not affect them or their interests in the estate. Having found that Musammat Sonari executed the mortgage not as representing the estate or the minors, but as claiming to be absolute owner of the property,

(1) (1912) I. L. R., 34 All., 296 : L. R., 39 I. A., 162

the courts below should have dismissed the suit as against the appellants, and as against the mortgaged property which belonged to them. A personal decree against Musammat Somari herself has not been asked for in this suit. We accordingly allow the appeal and dismiss the suit with costs in all courts

Appeal allowed.

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NANDAN PRASAD v. ABDUL AZIZ

Before Mr Justice Muhammad Rafiq and Mr Justice Lindsay

1923 *March*, 28

RAM CHAND KHANNA (DEFENDANT) v GOSWAMI RAM PURI (PLAINTIFF) *

Pre-emption—Muhammadan law—Extension of, among Hindus—Custom—Custom applicable to house property not necessarily applicable to cultivable land

Although a custom of pre-emption relating to house property and based upon Muhammadan law prevails in the city of Benares, it does not follow that such custom should be extended, without strict proof of its applicability, to the sale of land as distinct from house property

The Muhammadan law of pre emption should not be extended amongst Hindus beyond the limits established by proof of custom *Jagjivan Haribhai* v *Kalidas Muly* (1), referred to

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Jang Bahadur Lal*, Maulvi *Iqbal Ahmad* and Munshi *Shiva Prasad Sinha*, for the appellant

Dr. *Kailas Nath Katju*, for the respondent

MUHAMMAD RAFIQ and LINDSAY, JJ :—The subject-matter of the dispute in this case is a small plot of land, No. 1293, situated in Ramapura, one of the quarters of the city of Benares. According to the finding of the court below it has been used for the cultivation of fruit trees The parties to the suit are Hindus, and the plaintiff claimed to be entitled to pre-empt a sale of the plot in question made in favour of the defendant appellant.

It was alleged in the 4th paragraph of the plaint that a custom of pre-emption prevails in the city of Benares, upon which the plaintiff relied for his right It was further pleaded in the 6th paragraph of the plaint that the plaintiff had observed the preliminary formalities on hearing of the sale from which it is to be understood that the plaintiff admits that pre-emption as exercised in Benares city must be sought and enforced in accordance with the procedure laid down by the

* Second Appeal No 991 of 1921, from a decree of A G P Pullan, District Judge of Benares, dated the 2nd of June, 1921, confirming a decree of Muhammad Owais Karner, Munsif of Benares, dated the 28th of April, 1921

(1) (1920) I L R , 45 Bom , 604

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Muhammadan law. Both courts have decreed the plaintiff's claim. In appeal the main contention is that, as the plaintiff had failed to prove that the custom alleged extends to the purchase of lands as distinct from houses, his suit should have been dismissed. It is common ground that a custom of pre-emption relating to house property and based upon the Muhammadan law obtains in the city of Benares. This custom has been affirmed by a long series of judicial decisions. It is argued, however, that no judicial recognition has been extended to pre-emption where the subject of sale is land as distinct from house property.

It is true that in the course of the trial the plaintiff was able to produce a copy of a judgment delivered in the year 1865, in which pre-emption of a plot of land within the city was decreed. It is also shown that the judgment in question contains a somewhat obscure reference to a decree for pre-emption of land passed in the year 1853. But it is argued that this is no adequate proof of a custom of pre-emption relating to land in the city. The learned Judge of the court below took the view that inasmuch as it had been established that the Muhammadan law of pre-emption had been adopted with respect to house property, it should be presumed that the right of pre-emption extended to other kinds of property which may be pre-empted under the Muhammadan law, and that consequently the land in suit viz., an orchard, was so liable to pre-emption. He says there is no proof that the custom in Benares is confined to houses. It was, however, for the plaintiff to prove that the custom he relied upon extended to property other than houses, and, in our opinion, he failed to do so. The facts that a decree for pre-emption of a piece of land was passed so far back as the year 1865, and that possibly a similar decree had been passed some years earlier, would not be sufficient to show that such a custom extended to lands within the city. The fact that no instance of the pre-emption of such lands could be established between the year 1865 and the year 1920, when this suit was brought, is, in our judgment, the strongest possible proof that no such custom exists. There is no more prolific source of litigation in this province than the law of pre-emption, and it is impossible that had there been such a custom there should not have been many cases brought before the courts during this long period, during which there must have been numerous instances of sale of plots of land within the city. In the

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ruling in *Jagjwan Haribhai* v. *Kalidas Mulji* (1), the Bombay High Court, in dealing with a case from the Surat district, refused to extend the Muhammadan law of pre-emption to agricultural lands, although it was established that this law had been adopted generally with respect to house property in the district. The learned Judge of the court below was, however, of opinion that the principle laid down in this judgment should not be followed here, because the law of pre-emption has to a large extent been adopted in this province in the villages and with respect to zamindari property. But the considerations which apply in the case of village property do not apply necessarily to property in the cities. The custom in the villages has grown up out of the desire to prevent the intrusion of strangers into the co-parcenary bodies; no such consideration would arise in the cities where people of all classes congregate together. We think the principle laid down in the Bombay case is the right one to follow and that there should be no extension of the Muhammadan law of pre-emption among Hindus beyond the limits established by proof of custom.

It is here proved that the Hindus of Benares have adopted the Muhammadan law with respect to the pre-emption of houses. It is not, however, established that this law has been adopted so as to extend to property of other descriptions. The plaintiff has failed to prove his case, and, accepting the appeal, we set aside the decree of the court below and direct that the suit of the plaintiff be dismissed with costs in all courts.

Appeal allowed.

Before Mr. Justice Lindsay and Mr. Justice Daniels

1923

March, 29

BIDHI CHAND (PLAINTIFF) *v.* KACHHU MAL AND ANOTHER (DEFENDANTS) *

Act No. IX of 1872 (Indian Contract Act), section 30—Wagering contract—Principal and agent—Right of agent to recover from his principal notwithstanding the nature of the contract.

Section 30 of the Indian Contract Act, 1872, does not prevent a person who is employed as agent in connection with a wagering contract from recovering sums due to him by his principal. *Shibbo Mal* v. *Lachman Das* (2) and *Gopal Narain* v. *Sri Kishen Das* (3), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

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* Second Appeal No. 261 of 1922, from a decree of E. A. H. Sams, District Judge of Aligarh, dated the 3rd of December, 1921, confirming a decree of Ali Ausat, Subordinate Judge of Aligarh, dated the 4th of May, 1921.

(1) (1920) I. L. R., 45 Bom., 604.
(2) (1901) I. L. R., 23 All., 165.
(3) (1910) I. L. R., 32 All., 219.

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BIDHI CHAND v. KACHRU MAL.

Munshi *Gulzari Lal* and Munshi *Girdhari Lal Agarwala*, for the appellant.

Dr. *Surendra Nath Sen*, for the respondents.

LINDSAY and DANIELS, JJ.:—This appeal arises out of a claim brought by the plaintiff Bidhi Chand for certain sums paid by him for brokerage and commission in connection with certain forward contracts for the sale of cotton seeds etc., which he entered into as commission agent on behalf of the defendants. His case was that the defendants were to deliver the goods to him for sale to third parties on forward dates; that the defendants failed to supply the goods and that he had to compensate the buyers for the loss. The suit has been dismissed by both the courts below on the ground that the contracts were wagering contracts which are illegal under section 30 of the Indian Contract Act. It is not disputed that the contracts were wagering contracts. The plaintiff appeals on the ground that section 30 does not prevent a person who is employed as agent in connection with wagering contracts from recovering sums due to him by his principal. In support of this plea the rulings in *Shibbo Mal* v. *Lachman Das* (1) and *Jagat Narain* v. *Sri Kishan Das* (2), have been cited. It is not disputed on behalf of the respondents that these rulings support the plea of the appellant and that the law is as laid down in those rulings. The respondents contend, however, that there is a finding of fact of the lower appellate court in their favour that the plaintiff has failed to prove that he sold the goods on the defendants' account, and that in the opinion of the court below he sold them on his own account. We are of opinion that this cannot be treated as a finding of fact fatal to the appeal, for the short and simple reason that no issue on this point was ever framed and no such case was set up by the defendants when the case went to trial. No doubt the defendants in their original written statement denied that the plaintiff ever acted as commission agent for them and denied that any of the transactions relied on were entered into by the plaintiff on their behalf. This position was, however, materially modified by statements made by the pleaders of the parties under order X, rule 1, of the Code of Civil Procedure at the time of settlement of issues. In those statements it was admitted by both parties that there were two transactions, which are the transactions in suit, which were entered into by the plaintiff on account of the

(1) (1901) I. L. R., 23 All., 165.
(2) (1916) I. L. R., 33 All., 219.

defendants One of them was for 1,300 bags, and there was a dispute as to the amount of the other, the plaintiff alleging that it was for 1,300 bags and the defendant that it was for 600 bags only This is clearly set out in the judgment of the learned Subordinate Judge, who says that it is admitted by both parties that there were two contracts, one in *Katik Sambat* 1974 and the other in *Aghan Sambat* 1974, as to the amount of which there was a dispute. The issues framed by the learned Subordinate Judge were three in number. First, whether the contracts were of a wagering nature; secondly, whether the first of the two contracts was barred by time, and, thirdly, whether the second contract was for 1,300 bags or for 600 bags.

No issue was raised at all as to the position of the plaintiff as agent for the defendants The learned District Judge states in his judgment that he had received very little assistance from the Bar in deciding the appeal and he evidently found some difficulty in appreciating the position of the parties. The sentence on which the respondents rely would seem to be based on a misunderstanding of a sentence in the judgment of the trial court The learned Subordinate Judge had said that because it was a wagering transaction and no goods were to be delivered, so the plaintiff did not enter into contracts in the defendants' name, but on his own account, i.e., in his own name. It is clear on the admission of the parties that the plaintiff was not the principal in the disputed transactions but was acting as the agent of the defendants. The result is that, under the rulings already referred to, the decree of the court below must be and it hereby is set aside and the case remanded under order XLI, rule 23, to the lower appellate court for decision of the remaining issues. Costs here and heretofore will abide the result.

Decree set aside and cause remanded.

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April, 4

FULL BENCH.

Before Sir Grimwood Mears, Knight, Chief Justice, Justice Sir Pramada Charan Banerji, Mr Justice Piggott, Mr Justice Walsh and Mr. Justice Ryves

CHANSHAM SINGH (PLAINTIFF) v. BHOLA SINGH (DEFENDANT)*

Res judicata—*Mortgage—Suit for sale—Counterpart decrees recorded in two appeals in the same suit—Appeal by plaintiff from decree against him in one appeal but not from decree in his favour in the other.*

In a suit for sale on a mortgage the court of first instance passed a decree in favour of the plaintiff, but did not give him costs. The plaintiff appealed against the decree so far as it disallowed the costs. The defendant also appealed as to the amount of interest allowed to the plaintiff. Both appeals were heard together and were decided by one judgment and both appeals were allowed; but two separate decrees were passed, though each was a counterpart of the other. The plaintiff appealed to the High Court against the decree in the defendant's appeal below, but did not appeal against the decree (which was in his favour) in his own appeal.

Held that the fact that the plaintiff had not appealed against the decree passed by the court below in his own appeal was no bar to the hearing of his appeal against the decree passed in the defendant's appeal below.

Zuharan v. *Pebia* (1) distinguished. *Purnodar Das* v. *Shee Ram Das* (2), referred to. *Abdul Bust* v. *Ashfaq Husain* (3), *Dakhni Das* v. *Syed Ali Asghar* (4), *Ram Charan* v. *Lachman Prasad* (5), *Anant Das* v. *Udit Bhan Pargas* (6) and *Balhan Pande* v. *Shiva Sampat* (7) declared by the majority of the Full Bench to be no longer law.

THIS was a reference to the Chief Justice for the appointment of a Full Bench to decide whether in the circumstances of the case the hearing of the appeal—which was a plaintiff's appeal against a preliminary decree passed on appeal by the defendant in a suit for sale on a mortgage—was or was not barred by reason of the plaintiff not having appealed against the decree in a successful appeal brought by himself against the same decree, there having been a separate, though similar, decree placed on the record of each appeal.

The material facts appear from the order of the Bench referring the case, and are also set forth in the judgments of the Court, more particularly in that of BANERJI, J.

WALSH and RYVES, JJ.:—In this case there were two appeals in the court below, what may be called cross-appeals.

* Second Appeal No. 55 of 1921, from a decree of Gauri Prasad, Second Additional Subordinate Judge of Aligarh, dated the 21st of August, 1920, modifying a decree of Syed Nawab Husan, Munsif of Haveli, dated the 8th of June, 1920.

(1) (1916) I. L. R. 38 All., 51.
(2) (1907) I. L. R. 29 All., 730.
(3) Weekly Notes, 1908, p. 211.
(4) (1910) I. L. R. 33 All., 161.
(5) (1911) 9 Indian Cases, 667.
(6) (1913) I. L. R. 35 All., 187.
(7) (1919) 18 A. L. J., 40.

There were, therefore, two decrees, but both of them were in identical terms except as regards the costs of the appeal to which each of them applied. Colloquially stated, the question is: are there two decrees in substance, or is there one decree on two separate pieces of paper? A preliminary objection has been taken that as there is only one appeal to this Court, and the other decree against which no formal appeal has been launched has become final, the matter is *res judicata*. The appellant contends that it would be anomalous if an appeal, the object of which was to modify the decree, should be barred by the decree against which the appeal is brought. However, this view seems to have been taken in a variety of cases, spreading over a long period, by various Benches of this Court, including the three-Judges' Bench case of *Zaharia* v. *Debia* (1). The contrary view, or what we may call "the two pieces of paper view," has been taken very strongly in one decision of a two Judge Bench of this Court, in the case of *Damodar Das* v. *Sheo Ram Das* (2), which, however, may be said to be impliedly, if not expressly, overruled by the abovementioned three-judge case. It has also been taken very strongly in the case of *Abdul Majid* v. *Jew Naram Mahto* (3), and the case of *Mariamnissa Bibi* v. *Joynab Bibi* (4); and in the case of *Panchanada Velan* v. *Vaithinath Sastrial* (5).

It is clear that the prevailing view in this High Court sacrifices the ends of justice on the merits of the case to the purest technicality, and it seems right that the matter should be reconsidered from that point of view, having regard to the strong view which has been taken by two other High Courts.

We, therefore, refer the question to the CHIEF JUSTICE for him to determine whether it is more desirable to perpetuate the practice which prevails in this court or that the matter should be reconsidered by a Bench larger than that which decided the case of *Zaharia* v. *Debia* (1).

The appeal was accordingly laid before a Bench of five Judges.

Maulvi *Iqbal Ahmad*, for the appellant.

Munshi *Panna Lal*, for the respondent.

(1) (1910) I. L. R., 33 All., 51.
(2) (1907) I. L. R., 29 All., 730.
(3) (1888) I. L. R., 16 Calc., 239.
(4) (1906) I. L. R., 33 Calc., 1101.
(5) (1905) I. L. R., 29 Mad., 333.

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April, 4

FULL BENCH.

Before Sir Grimwood Mears, Knight Chief Justice, Justice Sir Pramada Charan Banerji, Mr Justice Piggott, Mr Justice Walsh and Mr Justice Ryves

GHANSHAM SINGH (PLAINTIFF) v. BHOLA SINGH (DEFENDANT) *

Res judicata—*Mortgage—Suit for sale—Counterpart decrees recorded in two appeals in the same suit—Appeal by plaintiff from decree against him in one appeal but not from decree in his favour in the other.*

In a suit for sale on a mortgage the court of first instance passed a decree in favour of the plaintiff, but did not give him costs. The plaintiff appealed against the decree so far as it disallowed the costs. The defendant also appealed as to the amount of interest allowed to the plaintiff. Both appeals were heard together and were decided by one judgment and both appeals were allowed, but two separate decrees were passed, though each was a counterpart of the other. The plaintiff appealed to the High Court against the decree in the defendant's appeal below, but did not appeal against the decree (which was in his favour) in his own appeal.

Held that the fact that the plaintiff had *not* appealed against the decree passed by the court below in his own appeal was no bar to the hearing of his appeal against the decree passed in the defendant's appeal below.

Zuharia v. *Debia* (1) distinguished. *Damodar Das* v. *Shiva Ram Das* (2), referred to. *Abdul Rasil* v. *Ashfaq Husain* (3), *Dakkni Din* v. *Syed Ali Asghar* (4), *Ram Charan* v. *Lachman Prasad* (5), *Anant Das* v. *Udai Bhan Pargas* (6) and *Balhari Pande* v. *Shiva Sampat* (7) declared by the majority of the Full Bench to be no longer law.

THIS was a reference to the Chief Justice for the appointment of a Full Bench to decide whether in the circumstances of the case the hearing of the appeal which was a plaintiff's appeal against a preliminary decree passed on appeal by the defendant in a suit for sale on a mortgage—was or was not barred by reason of the plaintiff not having appealed against the decree in a successful appeal brought by himself against the same decree, there having been a separate, though similar, decree placed on the record of each appeal.

The material facts appear from the order of the Bench referring the case, and are also set forth in the judgments of the Court, more particularly in that of BANERJI, J.

WALSH and RYVES, JJ. :—In this case there were two appeals in the court below, what may be called cross-appeals.

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(1) (1910) I. L. R., 33 All., 51.
(2) (1907) I. L. R., 29 All., 730.
(3) Weekly Notes, 1908, p. 211.
(4) (1910) I. L. R., 33 All., 161.
(5) (1911) 9 Indian Cases, 667.
(6) (1913) I. L. R., 35 All., 187.
(7) (1919) 18 A. L. J., 40.

There were, therefore, two decrees, but both of them were in identical terms except as regards the costs of the appeal to which each of them applied. Colloquially stated, the question is: are there two decrees in substance, or is there one decree on two separate pieces of paper? A preliminary objection has been taken that as there is only one appeal to this Court, and the other decree against which no formal appeal has been launched has become final, the matter is *res judicata*. The appellant contends that it would be anomalous if an appeal, the object of which was to modify the decree, should be barred by the decree against which the appeal is brought. However, this view seems to have been taken in a variety of cases, spreading over a long period, by various Benches of this Court, including the three-Judges' Bench case of *Zaharia* v. *Debia* (1). The contrary view, or what we may call "the two pieces of paper view," has been taken very strongly in one decision of a two Judge Bench of this Court, in the case of *Damodar Das* v. *Sheo Ram Das* (2), which, however, may be said to be impliedly, if not expressly, overruled by the abovementioned three-judge case. It has also been taken very strongly in the case of *Abdul Majid* v. *Jew Naram Mahto* (3), and the case of *Mariammissa Bibi* v. *Joynab Bibi* (4); and in the case of *Panchanada Velan* v. *Vaithinath Sastrial* (5).

It is clear that the prevailing view in this High Court sacrifices the ends of justice on the merits of the case to the purest technicality, and it seems right that the matter should be reconsidered from that point of view, having regard to the strong view which has been taken by two other High Courts.

We, therefore, refer the question to the CHIEF JUSTICE for him to determine whether it is more desirable to perpetuate the practice which prevails in this court or that the matter should be reconsidered by a Bench larger than that which decided the case of *Zaharia* v. *Debia* (1).

The appeal was accordingly laid before a Bench of five Judges.

Maulvi *Iqbal Ahmad*, for the appellant.

Munshi *Panna Lal*, for the respondent.

(1) (1910) I. L. R., 33 All., 51
(2) (1907) I. L. R., 29 All., 780
(3) (1888) I. L. R., 16 Calc., 233
(4) (1906) I. L. R., 33 Calc., 1101
(5) (1905) I. L. R., 29 Mad., 339.

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GHANSHAM SINGH v. BHOLA SINGH

MEARS, C. J., and PIGGOTT, WALSH and RAYES, JJ. :—'This appeal was referred to a Bench of five Judges to decide whether the appellant's right of appeal was barred by what has been called "the principle of *res judicata*," in accordance with a preliminary objection taken by the respondent, or, in other words, whether the ruling in *Zahuria* v. *Debia* (1) applied to it, or whether, as the appellant contended, it was governed by the ruling in *Damodar Das* v. *Shee Ram Das* (2), and in effect, therefore, whether the latter decision was correctly reported as having been overruled by the former.

We are of opinion that there is no such bar and that the preliminary objection fails. The facts are simple. The plaintiff sues upon a mortgage executed by the defendant in his favour, on the 28th of May, 1911, and claims re-payment of the principal amount secured, with interest thereon at the contract rate, or, in the alternative, sale of the mortgaged property. The Munsif decreed the claim, but deprived the plaintiff of costs upon the ground that the rate of interest was excessive and that the sum had swelled to an inordinate amount. From this preliminary decree both parties appealed to the Subordinate Judge, who varied the decree by reducing the plaintiff's claim to one for simple interest only, resulting in the sum of Rs. 468 and further interest *pendente lite*, and future interest up to the date of realization, and by awarding the plaintiff proportionate costs upon the amount due. He also directed that each party should pay its own costs of the appeal. Two separate decrees were drawn up in the lower appellate court. This fact has given rise to the present difficulty. In spite of the absence from the Code of any provision enabling two cross-appeals from the same decree to be consolidated, the appellate court in such a case has inherent jurisdiction, in disposing of the two appeals, as the court in this case did, by one judgment, so to mould its decree as to merge the result of the two appeals into one decree, representing the final adjustment of the rights of the parties on all the points raised, in a manner similar to the procedure adopted where there is one appeal, and cross-objections are made on behalf of the respondents. We have, however, to deal with a case in which two decrees were in fact passed, the terms of which were identical, except as regards the contents of the memorandum of costs endorsed on each,

(1) (1910) I. L. R., 33 All., 57
(2) (1907) I. L. R., 29 All., 730.

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respectively. The difficulty of carrying out the procedure adopted by the lower appellate court in this case, and the practical objection to it, are sufficiently shown by a perusal of the two decrees Though each is, *ex hypothesi*, intended to be independent of the other, and to be confined only to the separate appeal to which it relates, each in fact is framed in terms which refer to and operate upon both appeals, thereby defeating the object which the practice of drawing up two decrees must be presumed to be intended to achieve So far as concerns the decree drawn up in the plaintiff's appeal to the lower appellate court, both parties were satisfied. The plaintiff achieved his object by obtaining an order in his favour awarding him proportionate costs, and the defendant did not appeal against this The present appeal is brought by the plaintiff against the decree drawn up in the defendant's appeal to the lower appellate court which reduced the amount of his claim as awarded in his favour by the trial court.

It is the absence of any appeal by the plaintiff from the decree in his own favour in the lower appellate court, which except in so far as it repeats the reduced amount of the claim, contains nothing to his prejudice, that is said to create a bar to his present appeal In other words, the very decree against which he appeals is sought to be used against him as a bar to his right of appeal against it So stated, the objection is contrary to justice and common sense, and must, therefore, be fallacious.

The three-judge decision relied upon, *Zahuria* v *Debia* (1), certainly did not decide this In that case there were two suits by two independent plaintiffs asserting inconsistent titles to the same right One unsuccessful plaintiff appealed, but he did not appeal against the decree in the suit by the successful plaintiff which had been passed against him as defendant He left outstanding a final decree which so far affected his claim on the merits to his prejudice as to put an end to it altogether in favour of the other party. It would appear that the High Court, as the appellate court in that case, might have dismissed the appeal upon the merits unless the appellant was willing to bring up in appeal the other decree which prejudicially affected his right, and that it was not really necessary to invoke the doctrine of *res judicata*. The case of *Damodar Das* v *Sheo Ram Das* (2) was a very different case, substantially resembling

(1) (1910) I. L. R., 33 All., 57.
(2) (1907) I. L. R., 29 All., 7.

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the present case. In our opinion it was rightly decided, and not being in *pari materia* with the case of *Zaharia* v. *Debia* (1), cannot be said to have been overruled by that case. In *Damodar Das* v. *Sheo Ram Das* (2), the court rightly treated the two decrees as being in substance one, though drawn up in duplicate. But it is clear from the subsequent cases, and from the authorized report, that *Zaharia* v. *Debia* (1) has been treated as laying down a general rule to be followed in all cases in which an unappealed decree, passed in contemporaneous proceedings arising out of the same dispute, is outstanding in the lower appellate court. It, therefore, becomes necessary to lay down once and for all the practice which should in future bind the court, and to negative the general applicability of the rule in *Zaharia* v. *Debia* (1).

Without differing from that decision as applied to the facts of that and cognate cases, we are of opinion that some of the reasoning and *dicta* contained in the judgments went further than were necessary, or than we ourselves are prepared to go, and that they have been misapplied in some of the subsequent cases. Where it appears to an appellate court that there are two decrees arising out of two suits heard together or raising the same question between the same parties, or arising out of two appeals to a subordinate appellate court, and only one of such decrees is brought before it in appeal, and there is nothing prejudicial to the appellant in the decree from which no appeal has been brought which is not raised and cannot be set right if the appeal which he has brought succeeds, the right of appeal is not barred either by the rule of *res judicata*, or at all, by reason of his failure to appeal from the decree which does not prejudice him. It would be indeed wrong for an appellant to appeal against a decree which did not prejudice him and to which he did not object, or to appeal against two duplicate decrees where an appeal against one of them would be sufficient, and he is certainly under no obligation to do so. The ultimate rights of the parties must be adjusted and regulated according to the final decision of the last court of appeal.

It follows from this that we hold that *Damodar Das* v. *Sheo Ram Das* (2) was rightly decided, and that the following—*Abdul Basit* v. *Ashfaq Husain* (3). *Dakhni Din* v. *Syed Ali*

(1) (1910) I. L. R., 33 All., 51
(2) (1907) I. L. R., 29 All., 730.
(3) Weekly Notes, 1908, p. 211.

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Asghar (1), *Ram Charan* v *Lachman Pershad* (2), *Anant Das* v. *Udai Bhan Pargas* (3) and *Balhan Pande* v. *Shiva Sampat* (4), must be treated as being no longer law.

No doubt, the present case is a particularly strong one. The decree under appeal, which is a counterpart of the decree unappealed, is a preliminary decree in a mortgage suit It is established law that when a preliminary decree has been modified on appeal, the final decree must follow the appellate decree. It would be indeed strange if the existence of a duplicate preliminary decree in the same suit were a bar to an appeal against such preliminary decree.

BANERJI, J.—An objection has been taken to the hearing of this appeal on the ground that the appellant has not appealed from the decision by the lower appellate court of a connected appeal, both of which were decided by the same judgment. The circumstances under which the objection arises are these The plaintiff appellant brought a suit for sale on a mortgage. The defendant contested the suit on the ground, among others, that the amount of interest claimed was excessive The court of first instance overruled this plea and decreed the claim for interest, but it disallowed costs to the plaintiff as the amount of interest had swelled to a large figure. Both parties appealed from this decree, the plaintiff on the question of costs, and the defendant on the question of interest The defendant's appeal was No. 459 and the plaintiff's appeal was No. 460. Both the appeals were disposed of by the same judgment. The lower appellate court allowed both the appeals; reduced the amount of interest awarded by the first court, but allowed costs to the plaintiff. The plaintiff's appeal No. 460 was thus decided in his favour He accepted the decision and did not appeal from it As the other appeal No 459, which related to interest, was decided against him, he preferred the present appeal from the decision in appeal No 459 It is contended that as both appeals were decided by the lower appellate court by the same judgment and the plaintiff has not appealed from the decision in appeal No 460, the present appeal is not maintainable. In support of this contention the Full Bench case of *Zaharia* v. *Debia* (5) has been relied upon In my judgment that case has

(1) (1916) I L R , 38 All , 151
(2) (1911) 9 Indian Cases, 667
(3) (1913) I L R , 35 All . 187
(4) (1919) 18 A L J , 40
(5) (1910) I L R , 33 All., 51.

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no bearing on the present case and the objection urged on behalf of the respondent is untenable. The question before us is whether the plaintiff is precluded from maintaining the present appeal by reason of his allowing the decision in the connected appeal to become final, and we are not called upon to decide whether the ruling in the case of *Zahuria* v. *Debia* (1) or that in the case of *Damodar Das* v. *Shea Ram Das* (2) is right. The case last mentioned was not relied upon by Mr *Iqbal Ahmad* on behalf of the appellant, though it is referred to in the order of reference to the Full Bench. In my judgment, where the same question or issue arises between the same parties or between persons through whom they claim, in two suits or two appeals, the party against whom the question or issue is decided is bound to appeal from the decision in both the suits or appeals, and if he allows the decision in one of the suits or appeals to stand unreversed and to become final, he is precluded from maintaining the appeal preferred by him from the decision in one of the suits or appeals only. Where an issue has been decided between the same parties or their predecessors in title in two suits or appeals, the decision, if unreversed, is binding on the parties. If the party to whose prejudice the question has been decided allows the judgment in one of the cases to become final and therefore binding on him, the court cannot, in the other case or appeal, go behind the decision which has become final, and the necessary result is that the appeal in which the same question is sought to be re-opened cannot be sustained. This is what was held in the case of *Zahuria* v. *Debia* (1). In that case two rival suits for pre-emption in respect of the same sale were brought by two claimants, each of whom asserted, as against the other, that he had a paramount title to pre-empt. The claim of one of the two rival plaintiffs was decreed. The defeated plaintiff appealed from the decision in one of the suits and the judgment and decree in the other suit thus became final as between the parties. It was held that as the same issue had been raised and tried in both the suits and the decision of it in one suit became final as between the parties, it operated as *res judicata* and the issue could not be re-opened and tried in the appeal preferred by the party against whom the issue had been decided. I fully agree with this decision and I can find nothing in the judgment of STANLEY, C. J., who delivered

(1) (1910) I. L. R., 33 All., 51.
(2) (1907) I. L. R., 29 All., 780.

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the main judgment in the case, from which one may dissent. This case does not, in any way, support the contention of the respondent. The ruling in *Damodar Das* v. *Sheo Ram Das* (1) was not relied upon by the learned advocate for the appellant and we are not called upon to pronounce any opinion as to the correctness or otherwise of the decision in that case. If it be deemed to have laid down any rule of law inconsistent with the decision in *Zahara* v. *Debia* (2), I am not prepared to follow it. No reason is stated in the judgment for overruling the objection taken in that case. If the learned Judges intended to hold that no plea of *res judicata* could be raised merely because one judgment was delivered in the two cases, as held by the Calcutta High Court in one of the cases cited in the judgment, I am unable, with great respect, to agree with them. In the present case the only question which was decided in the appeal preferred to the court below by the plaintiff, viz., appeal No. 460, was the question of costs and that was decided in the plaintiff's favour. He had, therefore, no occasion to appeal against the decision in that case and his omission to appeal from that decision does not bar his present appeal. No issue was decided in appeal No. 460 which was adverse to him and no issue which arose and was decided in that appeal arises in the appeal now before us. There is, therefore, no bar to the hearing of this appeal. The difficulty which arises in this case is due to the fact that one decree only was prepared in both the appeals and a copy of that decree was filed in each case. This, however, did not entitle the plaintiff to appeal from the decision in the appeal in which he was the successful party. [illegible] suit was a mortgage suit and only one decree could be [illegible] it, the decree drawn up by the court below was the [illegible] which was the result of the decision in the two appeals [illegible] it. We must look to the substance and not to the [illegible]. Any ruling which militates against the view enunciated [illegible] case cannot be followed. I would overrule the objection on behalf of the respondent.

On receipt of the decision of the Full Bench, the judgments were delivered —

WALSH, J.—In this case, which is a second appeal, the original appeal came before this Court in last July. A preliminary objection was taken and fought [illegible] such objection on the basis of previous decisions in this Court, that decision referred the matter to the Full Bench which [illegible]

(1) (1907) I. L. R., 29 All., [illegible]
(2) (1910) I. L. R., 33 All., [illegible]

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preliminary objection and restored the case for hearing. It now comes before us on the merits. The respondent had the great advantage of having his case argued by Mr. *Girdhari Lal Agarwala*, and we ourselves are able to say that every fact in the case has been investigated. The matter is really a perfectly simple one, once the question of law is defined and understood. Mr. *Girdhari Lal* has even gone into the respondent's evidence and read us the defendant's original story which, however plausible, is not the defence which has been fought throughout the case. The defendant is a blind man, but nobody, as the first court says, suggests that he is a fool. Indeed, one's experience of life is that the more incurable the defendant's blindness and the greater the antiquity of his deafness, the more likely he is to be able to look after his own interest. There is no ground to suggest that the lender was in a position to dominate his will or that he used any improper pressure to extract the contract from him. The defendant himself says he did not extract the contract from him, but that his signature was obtained to a written document which was different in its essential terms from what the money-lender read aloud to him because he was blind. The first court felt compelled to allow the claim but endeavoured to punish the plaintiff by a special order relating to the costs. The lower appellate court has found that the bargain is hard and unconscionable but there is not a scrap of evidence to support that finding; on the contrary, the defendant stoutly denies he ever made it at all. The law is quite clear in transactions of anterior date to the Usurious Loans Act of 1918, which this was, being dated 1914. The defendant when sued upon the security can only escape payment of interest according to the contract rate, as required by Act XXVIII of 1855 or section II of Act XXVIII of 1855, by showing either that the contract was tainted by circumstances which brought it within the relief of section 16(*a*) and (*b*) of the Contract Act or by showing that it was one to which the law of legal necessity applied and that there was no necessity for granting such a high rate of interest. It is only in transactions subsequent to 1918 that he can avail himself of the recent legislation. If the learned Judge had been free to take the course which he did, we should probably have agreed with him. We certainly should not have reversed him. But, however laudable his intentions were, he departed from the strict legal aspects of the case, and we have no alternative but to reverse his decision. The way in which the preliminary

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objection was fought to the last is now, it appears, explained by the total absence, as Mr. *Panna Lal* must have realized from the first, of any chances of success on the points of law argued today by Mr. *Girdhari Lal*. The appeal is allowed and the decree of the first court restored as modified by the successful appeal of the plaintiff to the lower appellate court.

REVES, J.—I entirely agree. I only wish to add for the information of the learned Judge who relied on the case of *Kirpa Ram* v. *Sami-ud-din Ahmad Khan* (1) that that case turns on its own particular facts There the money-lender was dealing with a young man in a state of intoxication. The learned Judge might consult *Debi Sahai* v. *Ganga Sahai* (2) and the recent Privy Council case in *Aziz Khan* v *Duni Chand* (3).

Appeal allowed.

APPELLATE CIVIL.

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April, 4

Before Justice Sir Pramada Charan Banerji and Mr Justice Gokul Prasad

KEDAR NATH SINGH (DEFENDANT) v SHRO SHANKAR (PLAINTIFF) AND KASHI NATH AND ANOTHER (DEFENDANTS) *

Res judicata—*Claim based on a sale deed—Decision in a previous suit between the same parties as to the invalidity of the sale deed*

Where a claim to a certain property was based entirely on a sale deed and the question of the validity of the sale deed had arisen directly in a previous suit between the same parties, relating to another property also included in the deed, which could not be determined without a decision as to the validity of the sale deed, it was *held* that the decision in the previous suit must be held to be binding as between the parties

Ananta Balacharya v *Damodhar Makund* (4) and *Khaik Yar Khan* v *Mobari Begam* (5), referred to

THE facts of this case are fully set forth in the judgment of the Court

Munshi *Badri Narain* (with him Hafiz *Mushtaq Ahmad* for Dr *S. M Sulaiman*), for the appellant.

Babu *Harendra Krishna Mukerji* and Dr. *Kailas Nath Katju*, for the respondents.

BANERJI and GOKUL PRASAD, JJ. :—The suit out of which this appeal has arisen was brought by the plaintiff respondent for possession of a seven-storied house No. 7/27 called Chhoti Haveli situated near the golden temple in Benares. This

* First Appeal No 40 of 1921, from a decree of Suraj Narain Majmu, Additional Subordinate Judge of Benares, dated the 16th of December, 1920

(1) (1903) I L R, 25 All, 234
(2) (1910) I L R, 32 All, 589.
(3) (1918) 23 C W N, 130
(4) (1888) I L R, 13 Bom. 25.
(5) (1910) 7 Indian Cases, 389

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house had been purchased by Musammat Lakhpat Kunwar, the widow of one of the *pandas* of the temple, in 1898. She died on the 7th of January, 1901. On the 30th of December, 1903, she had made a will in favour of the plaintiff and letters of administration were, after death, obtained by the guardian of the plaintiff. The plaintiff claimed the property both as adopted son of the lady and also by virtue of the will. The claim on the basis of adoption was repelled by the court below, but the claim has been decreed by the learned subordinate judge on the ground that the property belonged to Musammat Lakhpat Kunwar at her death and that the plaintiff, by virtue of her will, has acquired it. On the 2nd of August, 1903, Musammat Lakhpat Kunwar executed a sale-deed in favour of the defendant Kashi Nath in respect of the house in question and certain movable property such as chandeliers, mirrors, etc., which were in the house, for a consideration of Rs. 3,000. The defendant, Kashi Nath, contended that under this sale-deed he had acquired the house, and it was alleged that under a partition between him and Kedar Nath, the appellant, the house had fallen to the share of Kedar Nath. After the death of Musammat Lakhpat Kunwar, when the application for letters of administration was pending, certain movable property alleged to have belonged to the lady was attached by an order of the court. The present defendant Kashi Nath applied to the District Judge for release of the movable property so attached. That application having been refused, he instituted a suit for establishment of his right to certain movables, including the movable property mentioned in the sale-deed of the 2nd of August, 1903. He alleged that under that sale-deed he had purchased the movable property mentioned in the sale-deed. On behalf of the present plaintiff, who was a defendant to that suit, it was contended that the sale-deed was nominal and fictitious and had been obtained from the lady, who was an old and *pardanashin* lady, by the defendant Kashi Nath who was her agent and whose father also was her mukhtar-am. The learned subordinate judge framed an issue as to the validity or otherwise of the sale-deed and he came to the conclusion that the sale-deed was a fictitious and nominal document and was invalid, and he dismissed the suit of the present defendant. Since then no further litigation took place in respect of the house in question. On the basis of the sale-deed the name of Kashi Nath was entered in the register of the Municipality of Benares in respect of this house in the place of

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Musammat Lakhpat Kunwar. Subsequently a person of the name of Ram Bharos was living in this house as tenant. The plaintiff instituted a suit against him for recovery of arrears of rent in the Court of Small Causes. Ram Bharos denied being the tenant of the plaintiff and stated that the house belonged to Kashi Nath and that he was Kashi Nath's tenant. Thereupon the plaint was returned to the plaintiff under section 23 of the Provincial Small Cause Court's Act, and the plaintiff then instituted the present suit for recovery of possession of the house against Kashi Nath, Kedar Nath and Ram Bharos. Ram Bharos died during the pendency of the suit. The defendants based their title upon the sale-deed of the 2nd of August, 1903, to which we have referred above. They also asserted that they were in adverse proprietary possession for more than 12 years and even if the plaintiff had any title, that title had become extinct. The court below held that the decision in the previous suit, dated the 25th of June, 1907, operated as *res judicata*, that, in its opinion, the sale-deed was fictitious and nominal and that the plaintiff had proved not only his title but also his possession within 12 years. It accordingly decreed the suit. The defendant Kedar Nath preferred this appeal. No doubt Kashi Nath who had supported the claim of Kedar Nath, produced the sale-deed of the 2nd of August, 1903. He also produced the title deeds of Musammat Lakhpat Kunwar. As Kashi Nath and his father were the agents and servants of Musammat Lakhpat Kunwar, the possession of the title deeds by these persons is not a circumstance which can carry any weight. Had the purchaser been a stranger to Musammat Lakhpat Kunwar, the fact of his possession of the original title deeds would have been a strong argument in favour of the sale-deed held by Kashi Nath not being a nominal document, but, having regard to the fact that Kashi Nath and his father were the servants of the lady and were looking after her cases, they had access to the documents belonging to her, and the fact of the title deeds being in their possession would not be a circumstance which would be prejudicial to the plaintiff's case. As regards the matter being *res judicata*, it seems to us that the question as to the validity or otherwise of the sale-deed of the 2nd of August, 1903, was a matter directly and substantially in issue in the previous suit. A portion of the property claimed in that suit was claimed on the basis of the sale-deed. Unless the validity of the sale-deed could be established, that part of

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the claim could not prevail. Therefore the question whether the sale-deed was a valid document was a question which arose directly and substantially in the previous suit, without a determination of which that suit could not be determined. It is true that the property now claimed was not claimed in the previous suit, but the title to this property and to the property then claimed was derived from the same source and the court decided that source, namely, the sale-deed, to be invalid and that it conferred no title on Kashi Nath. Most of the arguments which were used by the Bombay High Court in the case of *Ananta Balacharya* v. *Damodhar Makund* (1), apply with equal force to the present case. Our attention was drawn to the ruling of this Court in *Khalik Yar Khan* v. *Mobarik Begam* (2). No doubt there are observations in that judgment which favour the appellant's case, but we think that, as in the present case the claim is based entirely on the sale-deed, and the question of the validity of the sale-deed arose directly in the previous suit and that suit could not be determined without a decision as to the validity of the sale-deed, the decision in the previous suit must be held to be binding as between the parties. Furthermore that decision is a very strong piece of evidence against the present defendants.

[Their Lordships then proceeded to discuss the evidence as to the genuineness of the sale-deed, and the alleged adverse possession of the appellant, and held that the sale was a fictitious transaction and that adverse possession was not proved, and, in the result, dismissed the appeal.]

Appeal dismissed.

REVISIONAL CIVIL.

Before Mr. Justice Ryves.

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April, 6.

RAM DAYAL (PLAINTIFF) *v.* SHER SINGH AND ANOTHER (DEFENDANTS) *

Civil Procedure Code, section 149; *order VII, rule* 11, *clause* (c)—*Plaint insufficiently stamped—Power of a court to extend time for making good deficiency—Limitation.*

Where a plaint is filed in time and is correctly valued but insufficiently stamped, the court has power to grant time for making good the deficiency, and the suit is not affected by the fact that the period of limitation for it may expire during the time so granted. *Jainti Prasad* v *Bachu Singh* (3), held to be no longer law. *Gaya Loan Office Limited* v *Avadh Behari Lal* (4), referred to.

* Civil Revision No. 130 of 1922

(1) (1886) I. L. R., 13 Bom., 26

(2) (1910) 7 Indian Cases, 338.

(3) (1893) I. L. R., 15 All., 65.

(4) (1916) 1 Patna L. J., 420.

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RAM DAYAL v. SHER SINGH.

THIS was an application in revision from the decree of a Court of Small Causes dismissing the plaintiff's suit as barred by limitation The facts of the case sufficiently appear from the judgment of the Court.

Munshi *Panna Lal*, for the applicant

Babu *Piari Lal Banerji*, for the opposite parties

RIYES, J.—The plaintiff, Ram Dayal, sued to recover money due to him on a bond executed by the defendant He filed his plaint on the 15th of May, 1922, which was the last day of limitation. The Munsarim made a report that, although the suit had been properly valued, the court fee paid was insufficient. Thereupon the court gave the plaintiff time up to the 19th of May to make good the deficiency. The deficiency was made good on the 17th of May and the plaint was then registered At the trial the defendant pleaded, among other things, that the suit was barred by limitation. The court found, on the merits, for the plaintiff, but held that the suit was barred by limitation on the authority of *Jainti Prasad* v *Bachu Singh* (1) The plaintiff, in revision, urges that that decision is no longer law and that under order VII, rule 11, clause (*c*), of the Code of Civil Procedure read with section 149 of the Code of Civil Procedure, the court had power in its discretion to allow the plaintiff further time in which to make good the deficiency of court fee and that if such deficiency was made good within the time prescribed, the fact that in the meantime limitation had expired would not affect the suit. It seems to me that this contention is correct The rule in *Jainti Prasad* v. *Bachu Singh* (1) was not followed in the other High Courts. It seems to me that under order VII, rule 11, clause (c), read with section 149 of the Code of Civil Procedure, the Legislature deliberately intended to supersede that decision A similar view is taken in *Gaya Loan Office Limited* v. *Awadh Behari Lal* (2). In my opinion the court below was wrong in dismissing the suit on the ground of limitation As on all other points the court below has found in favour of the plaintiff, I set aside the decree of the court below, and decree the plaintiff's claim with costs in both courts.

Decree set aside

(1) (1893) I L R, 15 All, 65

(2) (1916) 1 Patna L J, 420

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April, 9

APPELLATE CIVIL.

Before Mr. Justice Walsh and Mr. Justice Ryves

MUL RAJ AND ANOTHER (DEFENDANTS) v. FAZAL IMAM (PLAINTIFF) *

Act No IV of 1882 (Transfer of Property Act), section 41—"Ostensible owner"—Nature of facts warranting the application of section 41.

On the death of his mother, some time in the early nineties, one Habib took possession of some immovable property belonging to her, to the exclusion of his sister, and had his name alone entered in the khewat. In 1896, Habib mortgaged the property, but afterwards redeemed it. In 1908, and again in 1911, Habib mortgaged the property afresh to the son of the former mortgagee. But it was not until the mortgagee had filed a suit on his mortgages and purchased the property in execution of the decree obtained thereon, that Habib's sister, who was living in the same place, sued to set aside the mortgage and recover her share by inheritance.

Held that the facts of the case justified the application of section 41 of the Transfer of Property Act, 1882, and the plaintiff was not entitled to recover. *Jamna Das* v. *Uma Shankar* (1), and *Khwaja Muhammad Khan* v. *Muhammad Ibrahim* (2), referred to.

THE facts of the case are fully stated in the judgment of the Court.

Munshi *Bhagwati Shankar* (for Munshi *Damodar Das*), for the appellants, submitted that the facts proved established that Habib was the ostensible full owner in possession of the property, and it having been mortgaged to defendant's father, in 1896, he had no reason to doubt the ownership of Habib. He took the property in good faith. A third person claiming the property had not only to show that he was the owner, but also to establish that there were circumstances that gave notice of such ownership to the purchaser, and put him on inquiry. The law required the purchaser only to take sufficient care, which he did in this case. There was nothing to show that the defendant was even aware of Roshin's existence. He relied on *Thakuri* v. *Kundan* (3).

Mr. *S. A. Haidar*, for the respondent, contended that the mortgage of 1896 was a simple mortgage and was paid off. The state of things remained unaltered. There was nothing to show that Roshin knew of it or had anything to do with it. The same remarks applied to the second and third mortgages of 1908 and 1911. The lady knew of the dealings of her brother with the property only when it was brought to sale. The transferee should make inquiries as to what persons were interested in the property. It was not sufficient to rely on entries

* First Appeal No 169 of 1922, from an order of Pratap Singh, Additional Judge of Saharanpur, dated the 16th of September, 1922.

(1) (1914) I. L. R., 36 All., 308
(2) (1904) I. L. R., 26 All., 400.
(3) (1895) I. L. R., 17 All., 280.

in revenue papers Moreover, the finding that the appellant made no inquiries was one of fact and binding on the court. He relied upon the case of *Jamna Das* v *Uma Shankar* (1). In case of *pardanashin* ladies, the name of some male member is usually entered in the revenue papers for the purposes of rent suits It was not enough for the defendant mortgagee merely to say that he had examined the khewat He referred to *Ganga Ghulam* v *Tapeshri* (2) Unless it appeared that the lady had knowledge of the transfer, it could not bind her. The lower court had held that if Mulraj had made inquiries he would have learnt that the respondent had an interest in the property. The question whether in the circumstances of a case a sufficient inquiry was made, was one of fact The lower court took all facts into consideration and came to a finding that the purchaser made no reasonable inquiries He referred to *Partop Chand* v. *Sayida Bibi* (3) That was a stronger case. It would be setting a bad precedent if people were allowed to rely on section 41 merely because they took transfers from persons whose names appeared on the khewat. A person who dealt with a Muhammadan was under a duty to inquire if he had sisters, mothers, etc , or not.

WALSH and RYVES, JJ. —The property in suit belonged originally to one Musammat Munir-un-nissa. She died apparently in the early nineties, leaving a son Habib Hasan and a daughter Musammat Roshin. The name of Habib Hasan alone was entered in the revenue papers on the death of Musammat Munir-un-nissa, and Habib Hasan has remained in physical possession of the property ever since then. In 1896 he mortgaged this property to the father of Mulraj. That mortgage was paid off in due course. Habib Hasan made another mortgage in 1908 and a third mortgage in favour of Mulraj in 1911. Subsequently Mulraj brought a suit on this mortgage, and having got a decree for sale, put the property up for sale and bought it himself. Thereupon the suit out of which this appeal arises was brought by Musammat Roshin for a declaration that she was entitled as owner to one-third of the property in suit and for a declaration that the mortgage and sale, so far as her one-third share is concerned, were inoperative She pleaded that as a matter of fact she had been all along in possession through her brother, but that if it be held

(1) (1914) I L R , 36 All , 309 (311
(2) (1904) I L R , 26 All , 600
(3) (1901) I L. R., 29 All., 442 (447).

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that she was not in possession, she asked for possession of her share. Various defences were raised by Mulraj, but it is only necessary to consider the defence raised by him under section 41 of the Transfer of Property Act. The learned munsif, on the evidence of the parties, came to the conclusion that Habib Hasan had been acting as ostensible owner of this property and that Mulraj was entitled to the benefit of section 41 of the Transfer of Property Act. He, accordingly, on this short point, dismissed the suit. Musamma: Roshin having died, her heir appealed to the court below, and the learned District Judge of Saharanpur came to the conclusion that section 41 of the Transfer of Property Act did not apply. He held that "the parties to the mortgage were residents of the same place (the town of Deoband) and the property in suit was also situated there. The defendant Mulraj admits that he took the mortgage without making any inquiry, simply because Habib Hasan's name was recorded in the khewat and he had on a previous occasion mortgaged it to his father. He did not know how Habib Hasan had got that property and made no inquiry about it." Under these circumstances the court held that section 41 had no application. He therefore set aside the decree of the court below and remanded the case for decision of the other points raised in the case. Mulraj appeals and urges that the question whether section 41 does or does not apply to the facts as found is a question of law, and that on the facts as found the learned Judge was wrong in holding that section 41 did not apply. Mr. *Haidar* very strenuously urges that a finding that section 41 of the Transfer of Property Act does not apply is a finding of fact which cannot be interfered with in second appeal and he lays stress on the case of *Jamna Das* v. *Uma Shankar* (1). In that case the lower appellate court held that section 41 did not apply. On second appeal to this Court a single Judge of the Court held that section 41 of the Transfer of Property Act did apply. On the case being taken up in Letters Patent appeal a Bench of this Court set aside that decision, holding that "whether Lal Muhammad was the ostensible owner of the property with the consent, express or implied, of the heirs of Muhammad Bakhsh, and the further question whether the plaintiff in that case *bonâ fide* took the transfer after taking reasonable care to ascertain the title of Lal Muhammad, were questions of fact

(1) (1914) I. L. R., 36 All., 303.

to be decided by the lower appellate court" and held that, "this Court is bound by the findings of fact of the lower appellate court in second appeal and cannot go behind them whether it approves of that finding or not." If the learned Judges meant to hold that the question whether section 41 of the Transfer of Property Act applies to a given set of facts is a question of fact, we cannot agree with them, but we do not think really that that is what they meant. We think that case really means this, that, on the facts as found by the lower appellate court, which facts could not be questioned in second appeal, it was not open to this Court to say that section 41 applied There are a number of cases to the contrary; for instance, the case relied upon by the trial court, viz., *Khwaja Muhammad Khan* v. *Muhammad Ibrahim* (1).

Now the facts in this case are not in dispute. Since the early nineties, Habib Hasan's name alone had been recorded as the owner of this property He has been dealing with it as his own ever since. As long ago as 1896 Habib Hasan alone mortgaged this property to the father of the present mortgagee. That mortgage has been paid off. No one ever took any exception to that mortgage Surely Mulraj was entitled to believe, under the circumstances, that that mortgage had been properly made by Habib Hasan Twenty-one years afterwards Habib Hasan mortgages the same property to him. He satisfies himself that Habib Hasan's name is still in the khewat as the recognized owner of the property so far as Government is concerned We fail to see what further inquiry Mulraj should have made. What was there to put him on to inquiry or to doubt the genuineness of the position Habib Hasan had ostensibly maintained for over 25 years? Under the circumstances, on the facts as found by the courts below we think as an inference of law that section 41 of the Transfer of Property Act applied and that on that ground the suit was rightly dismissed

We, therefore, set aside the decree of the court below and restore that of the trial court with costs.

Appeal allowed

(1) (1904) I L. R., 26 All., 490.

1923
April, 10.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Gokul Prasad

ALI JAN KHAN AND ANOTHER (DEFENDANTS) *v.* MAJID-UD-DIN AND ANOTHER (PLAINTIFFS) AND SIRAJ-UD-DIN AND OTHERS (DEFENDANTS) *

Mortgage—Redemption—What amounts to destroying the integrity of a mortgage so as to enable the mortgagor to redeem piecemeal

If a mortgagee releases a portion of the mortgaged property by receiving the amount of money alleged to be due from such property, he does not thereby break the integrity of the mortgage nor does the mortgagor become entitled to redemption of a portion only of the property. The integrity of a mortgage can only be broken up in case the mortgagee or mortgagees purchase a part of the mortgaged property. *Lachmi Narain* v. *Muhammad Yusuf* (1), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Maulvi *Iqbal Ahmad* and Munshi *Panna Lal*, for the appellants.

Maulvi *Muhammad Abdul Aziz* and Maulvi *Haidar Mehdi*, for the respondents.

BANERJI and GOKUL PRASAD, JJ.:—This appeal arises out of a suit for sale on a mortgage. The mortgage was executed on the 19th of December, 1895, by Wahaj-ud-din and others for a sum of Rs. 30,000 in favour of two persons, Radha Mohan and Madan Mohan. The property mortgaged consisted of a certain pension and a number of houses. The mortgagees were, however, given the option of realizing Rs. 5,000, out of the principal, and interest thereon from the houses mortgaged. The interest on the Rs. 25,000 was payable out of the pension charged and the balance of interest and also the principal were to be paid by the mortgagors.

It appears that on the 24th of April, 1918, the mortgagees sold Rs. 5,000, and interest thereof, out of the mortgage money to the plaintiffs, the heirs of one of the mortgagors, namely, Abdus Samad, for a sum of Rs. 5,000. The purchasers now sued for recovery of the Rs. 5,000 principal debt and the interest thereon, the total of which now amounts to Rs. 34,000 by sale of the houses mortgaged. The appellants before us, who are some of the purchasers of parcels of mortgaged property, raised several defences in the lower court. All these defences have been overruled and they come up in appeal. The first point raised by them is that the integrity of the mortgage has been broken up by the act of the mortgagees themselves, and hence they cannot recover more than the proportionate

* First Appeal No. 365 of 1920, from a decree of Shibendra Nath Banerji, Subordinate Judge of Allahabad, dated the 31st of March, 1920.

(1) (1894) I. L. R., 17 All., 63

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ALI JAN KHAN v. MAJID UD DIN

amount due from the houses in possession of the appellants. The facts are these. It appears that on the 24th of January, 1907, the heirs of Wahaj-ud-din, one of the mortgagors who was admittedly the sole owner of the property mortgaged, sold a house to one Tasadduq Husain for Rs. 400. Out of this amount Rs. 200 were paid to the mortgagees who thereupon released that house from any further liability under the mortgage. This, it is claimed by the appellants, amounted to a disruption of the integrity of the mortgage. This point is covered by direct authority, and it has been held that if a mortgagee releases a portion of the mortgaged property by receiving the amount of money alleged to be due from such property, he does not thereby break the integrity of the mortgage nor does it entitle the mortgagor to redemption of a portion only of the property. They have, in other words, followed the rule that the integrity of the mortgage can only be broken up in case the mortgagee or mortgagees purchase a part of the mortgaged property. See the case of *Lachmi Narain* v. *Muhammad Yusuf* (1).

The next point urged by the learned vakil for the appellants is that an acknowledgment made in 1907 by the then guardian of Wasi-ud-din, a minor, does not amount in law to a valid acknowledgment, and, therefore, the suit on the mortgage in dispute instituted on the 19th of December, 1895, is now barred by the 12 years rule of limitation. Section 21 of the present Limitation Act (No. IX of 1908) is a sufficient answer to this contention.

The third point raised before us is to the effect that the properties Nos. 1, 3, 5, 16, 24, 26 and 39 were not mortgaged and a decree for their sale was therefore wrong. The plea as to property No. 5 has been abandoned here as it was taken under a misapprehension. We have been referred to the evidence as to some of these items and there is nothing in that evidence to warrant us in coming to a conclusion different from that of the court below which had in some cases visited the locality itself to test the correctness of the boundaries. The appeal on this ground also fails. We have not been shown sufficient reasons to come to a different conclusion from that arrived at by the trial court. We, therefore, dismiss this appeal with costs.

Appeal dismissed.

(1) (1894) I. L. R., 17 All., 63.

1923
April, 11.

REVISIONAL CRIMINAL.

Before Mr. Justice Daniels.

EMPEROR *v.* BHURE MAL.*

Criminal Procedure Code, section 144—Temporary order passed by District Magistrate forbidding processions of any kind along certain streets—Power of Local Government to extend such order indefinitely—Act No. XLV of 1860 (Indian Penal Code), section 188.

A District Magistrate passed an order under section 144 of the Code of Criminal Procedure forbidding, for reasons set forth therein, the passage of processions, whether religious or otherwise, along particular streets in a certain town. The Local Government subsequently directed, by notification in the *Gazette*, that this order should remain in force until it was cancelled by a similar notification.

Held that the Local Government was perfectly competent under sub-section (5) to extend the period of the Magistrate's order and was not limited to any particular kind of procession.

THIS was an application in revision against the conviction and sentence of the applicant under section 188 of the Indian Penal Code for disobedience to an order made by the District Magistrate of Bareilly and subsequently extended by the Local Government. The facts of the case are fully set forth in the judgment of the Court.

Pandit *Uma Shankar Bajpai*, for the applicant.

The Assistant Government Advocate (Mr *R. Malcomson*), for the Crown.

DANIELS, J.:—This is an application in revision against the conviction of the applicant for an offence under section 188 of the Indian Penal Code. The charge against the applicant was that he took part in an unlawful procession which had been prohibited by an order lawfully passed under section 144 of the Code of Criminal Procedure. The District Magistrate of Bareilly originally issued an order forbidding any procession whatever to pass down certain streets in Bareilly. This could only remain in force for two months, unless the period was extended by the Local Government under sub-section (5). Before the expiry of the period of the order, the Local Government passed an order, which was duly notified in the Gazette, directing that the order should remain in force until cancelled by a notification in the *United Provinces Gazette*.

Four grounds of revision have been urged, three of them attacking the legality of the order passed by the Local Government and the fourth alleging that, even if the order was legal, the offence under section 188 was not proved.

* Criminal Revision No. 93 of 1923, from an order of H. N. Wright, Sessions Judge of Bareilly, dated the 23rd of October, 1922.

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EMPEROR v. BHURE MAL.

The first contention of the applicant is that the order could only have been extended lawfully with reference to religious processions. The learned counsel relies on the preamble to the order, in which the learned District Magistrate sets forth his reasons for passing it. The District Magistrate considered that as these particular streets were narrow in the extreme, the taking of processions through them might cause constant risk of obstruction, annoyance and injury to persons pursuing their lawful occupations, and that, further, on the occasion of religious festivals there was the added danger of riot or affray. The operative part of the order was, however, a prohibition against any procession of any kind passing down the streets in question The Local Government was not concerned with the reasons given by the Magistrate, but with the actual order passed by him, and if the Local Government considered that there was danger to human life, health or safety, or likelihood of a riot or affray in allowing processions to pass down these streets, the Local Government was perfectly competent under sub-section (5) to extend the period of the order and was not limited to any particular kind of procession.

The second objection taken is to the form in which the order was passed, namely, that it should remain in force until cancelled by a notification in the Gazette. Reliance is placed on the heading of the chapter which refers to temporary orders in urgent cases of nuisance or apprehended danger, and it is urged that the Local Government had only power to extend the order for a definite and very limited time. The Legislature has, however, not seen fit to limit the time for which the force of the order may be extended and under the terms of the section it was competent to the Local Government to extend the order so long as the danger which it apprehended continued to exist.

The third objection is that the Local Government, in extending the period of the order, has not stated the danger which it apprehended and which led to the notification being issued. Here, again, there is nothing in the section which requires the Local Government to state its reasons or even to state the fact of a likelihood of a riot or affray or other danger which it apprehends, and it is not open to this Court to add to the section a condition not imposed by the Legislature.

The last point pressed is that it is not shown that the disobedience on the part of the accused caused or tended to cause danger to human life, health or safety, or a riot or affray, within

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EMPEROR v. MAQSUD HUSAIN.

in that section must have the same meaning as criminal trespass in other parts of the Code. As long ago as 1896 it was held by a learned Judge of this Court in *Queen-Empress* v. *Subhan* (1), that the word trespass in the section must be taken in its original meaning and as a word which covered any injury or offence done and to couple it with entry upon property. That decision has remained unchallenged for 27 years. It was quoted with approval in *Emperor* v. *Ram Prasad* (2), by a Divisional Bench of this Court and the same view seems to have been taken by a Bench of the Madras High Court in *In re Ratna Mudali* (3). In my opinion this argument, therefore, fails.

The second argument put forward is that what really happened was that the accused and the woman had gone into the mosque solely with the intention of looking at the illuminations and had taken the cot with them merely to sit on it, when, under a moment of impulse, they misconducted themselves, and that, therefore, there was no intent within the meaning of the section. I do not propose even to consider this argument because it is based only on the ingenuity of counsel and is not supported by any evidence and is, in fact, flatly contradicted by the statements of the accused themselves and their evidence. According to them they were not inside the mosque at all. There was no cot and there was no misconduct. The conviction, therefore, in my opinion, was right and the sentence appropriate. I reject the application.

Application rejected.

REVISIONAL CIVIL.

Before Mr Justice Daniels.

1923
April, 13.

EAST INDIAN RAILWAY COMPANY (DEFENDANT) *v.* KISHAN LAL, TIRKHA MAL (PLAINTIFF) *

Railway company—Goods consigned under risk-note in form B—"Loss"—Suit for damages for non-delivery of goods—Burden of proof

The term "loss" as used in risk-note form B means loss by the railway company of goods consigned to it and not loss to the plaintiff. *Secretary of State* v. *Juman* (4), referred to.

The plaintiff sued for damages caused by the non-delivery of part of a consignment made over to a railway company for carriage under risk-note form B.

* Civil Revision No 28 of 1923.

(1) (1896) I. L. R., 18 All., 395.
(2) (1911) I. L. R., 33 All., 773.
(3) (1886) I. L. R., 10 Mad., 126.
(4) (1923) I. L. R., 45 All., 880.

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Held that it lay on the defendant company to give evidence that the goods had been lost, which if they had done, it would have been for the plaintiff to prove that the loss was due to a cause for which the company would be liable: *Ghelabhai* v *The East Indian Railway Company* (1), referred to: *Hill, Sawyers and Company* v *The Secretary of State* (2) not followed: *East Indian Railway Company* v *Nathmal, Behari Lal* (3) and *Smith* v *Great Western Railway Company* (4), distinguished.

THE facts of this case are set forth in the judgment of the Court. Shortly stated they were as follows:—

The firm of Jado Rai Bhana Mal consigned 126 bags of Java sugar from the Docks, Calcutta, on the 12th of December, 1921, for delivery to the plaintiff at Ghaziabad. On the 24th of December, 1921, the consignment was delivered, three bags short, at Ghaziabad. The plaintiff sued the East Indian Railway Company in the Court of Small Causes at Ghaziabad for damages on account of the non-delivery of part of the consignment. The defendant pleaded risk-note forms A and B; that there was no wilful negligence, and that there was a running train robbery in which the goods were lost.

The Court found that there was no proof of loss, which the railway was bound to give; that, therefore, the risk-note did not protect, and relying on *Ghelabhai* v *East Indian Railway*, (1) and *Jamma Dhar* v. *Burma Railways* (5), decreed the claim.

The defendant applied in revision to the High Court.

Lalli Prasad Zutshi, for the applicant, submitted that it was a case of loss. Loss meant both loss to the plaintiff and loss by the company. He cited *Hill, Sawyers and Co Ltd.*, v. *Secretary of State* (2). It was for the plaintiff to bring his case within the proviso to risk-note form B. He relied on *East Indian Railway Company* v *Nathmal, Behari Lal* (3), *Sheobarut Ram* v. *Bengal and North-Western Railway*, (6), and *Smith* v. *Great Western Railway Company* (4).

N. C Vaish, for the opposite party, contended that having

(1) (1921) I L R, 45 Bom., 1201.
(2) (1921) I L R, 2 Lahore, 139
(3) (1917) I L R, 39 All, 418
(4) (1922) L R, 1 A C., 178.
(5) (1920) 64 Indian Cases, 395
(6) (1912) 16 C W. N., 784

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regard to the pleadings, the company should have proved loss. Loss meant loss by the company. He relied on *Secretary of State* v. *Jiwan* (1).

DANIELS, J. :—This revision raises a question of the liability of a railway company in respect of goods consigned under risk-note B. In this form of risk-note the consignor, in view of reduced rate of freight, agrees to hold the railway "harmless and free from all responsibility for any loss, destruction or deterioration of or damage to the said consignment, from any cause whatever, except for the loss of a complete consignment or of one or more complete packages . . . . due either to the wilful neglect of the railway administration or to theft by or to the wilful neglect of its servants," with a further proviso that "wilful neglect shall not be held to include fire, robbery from a running train or any other unforeseen event or accident."

One hundred and twenty-six bags of sugar were consigned to the plaintiff under a risk-note in this form. On taking delivery the number was found to be short by three bags. The plaint alleges that in consequence of this short delivery the plaintiffs have suffered loss to the amount claimed. In defence the railway company set up the risk-note and they further alleged that in this case the loss of the bags was due to theft from a running train. It has been held that in this connection the terms robbery and theft are equivalent, *Great Indian Peninsula Railway* v. *Bhola Nath Debi Das* (2). The case was tried in the Small Cause Court. The view taken by the learned Judge of the court below was that as the plaintiff did not allege in his plaint that the goods were lost, but merely that he had not received them, it lay on the defendants to prove loss of the goods, and it was only after they had proved this that the plaintiff would be required to prove that the loss was due to a cause for which the railway company would be liable. In support of this view the learned Judge relies on the case of *Ghelabhai* v. *East Indian Railway Company*, reported in I. L. R., 45 Bom., 1201, though the learned Judge prefers to cite the case from some volume of private reports.

The trial judge has held that loss means loss of the goods by the railway company.

(1) (1923) I. L. R., 45 All., 380
(2) (1922) I. L. R., 45 All., 56

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The same view was taken by LINDSAY, J., in *Secretary of State* v. *Jiwan* (1), in a case in which a consignment of food had rotted owing to delay in transit and the plaintiff had suffered loss in consequence. The delay was found to be due to the wilful neglect of the railway company. The goods were consigned under risk-note B, as in the present case. The risk-note gave the railway absolute protection in respect of damage to the goods. It did not protect them against loss, if the loss was due to the wilful neglect of their servants. The learned Judge held that "loss" meant loss by the railway company and not loss to the plaintiff. On this view the plaintiff is entitled to a decree in the present case. In that case the plaintiffs were suing for something which was *primâ facie* within the protection afforded by the risk-note, namely, damage to the goods. Therefore in the absence of proof of loss the suit failed. Here the plaintiffs are suing for something which is *primâ facie* outside the protection afforded by the note, namely, breach of the contract to deliver. In the absence of evidence of loss, the plaintiff is entitled to succeed. No doubt a different view has been taken by the Punjab High Court in *Hill, Sawyers & Co.* v. *The Secretary of State* (2), but the subordinate judge was bound to follow the rulings of this Court.

Reliance is placed by the respondent on *East Indian Railway Company* v. *Nathmal, Behari Lal* (3), and *Smith* v. *Great Western Railway Company* (4). In both these cases the loss of the goods was admitted by the plaintiffs. In the former case the goods were missing on the arrival of the train at its destination. In the English case it is specifically stated in the last paragraph of LORD WRENBURY'S judgment that the plaintiff alleged the loss of the goods. The argument turned on whether wilful negligence could be assumed from the mere fact of non-delivery. Moreover, the protection given to the railway was in wider terms and included delay or detention.

For the above reasons I am unable to accept this revision, which I accordingly dismiss with costs.

Application rejected.

(1) (1923) I. L. R., 45 All., 380
(2) (1921) I. L. R., 2 Lahore, 133
(3) (1917) I. L. R., 39 All., 418
(4) (1922) L. R., 1 A. C., 178

1923
April, 10.

Before Mr Justice Daniels

EAST INDIAN RAILWAY COMPANY (DEFENDANT) v. GOPI KRISHNA, KASHI PRASAD (PLAINTIFF).*

Railway company—Goods consigned under risk-note in form B—Suit for damages on account of unreasonable delay in delivery—Company not protected from liability.

Where goods were consigned for carriage by rail under risk-note form B and loss was caused to the consignor owing to unreasonable delay on the part of the railway company concerned in delivering them, and not by reason of any loss, destruction or deterioration of the goods, it was *held* that the company was not protected from liability. *Ram Kishan Ram* v. *North-Western Railway* (1), and *Secretary of State* v. *Juwan* (2), distinguished.

THIS was an application in revision against a decree of a Court of Small Causes giving damages against the defendant, the East Indian Railway Company, on account of their failure to deliver within a reasonable time certain goods which had been consigned to them for carriage under a risk-note in form B. The facts of the case are sufficiently stated in the judgment of the Court.

Babu *Benoy Kumar Mukerji*, for the applicant.

Munshi *Surendra Nath Varma*, for the opposite party.

DANIELS, J.:—This is a revision directed against an order of the Small Cause Court and raises a question of the liability of the railway company under risk-note B. The goods in question were consigned from Turighat near Ghazipur on the East Indian Railway to Manbhum, on the 26th of January, 1922. The goods were not lost nor were they destroyed, but the railway company took five months to convey them and they did not reach their destination until the 25th of June, 1922. The delay was unquestionably unreasonable. The trial court finds that owing to this delay damage was suffered by the plaintiff quite independently of any deterioration of the goods. The *ghee* was in fact sent with a view to a marriage which had already taken place before the consignment was received. The risk-note B under which the goods were despatched protected the railway company from any claim for damages due to the loss, destruction or deterioration of the goods or for damage to the consignment except in certain specified cases. On the finding of fact of the court below the cause of action in this case was not due to any of the special events against which the railway is protected by the risk-note. It was, therefore, outside the protection afforded by the note and the cases of *Ram*

* Civil Revision No. 32 of 1923

(1) (1922) 20 A. L. J., 973.

(2) (1923) I. L. R., 45 All., 380

1923

EAST INDIAN RAILWAY COMPANY v. GOPI KRISHNA, KASHI PRASAD.

Kishun Ram v. *North-Western Railway* (1) and *Secretary of State* v. *Jiwan* (2) are distinguishable. The case is somewhat similar to Civil Revision 23 of 1923 recently decided by me (3). On the finding of fact of the court below the revision cannot succeed, and I accordingly dismiss it with costs.

A ground that the damages were wrongly assessed was taken in the grounds of revisions but was not argued, and I cannot, therefore, take notice of it.

Application rejected.

APPELLATE CIVIL.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Gokul Prasad.

1923
March, 9.

TIRMAL SINGH (DEFENDANT) *v.* KANHAIYA SINGH AND ANOTHER (PLAINTIFFS) *

Letters Patent, section 10—Review of judgment—No appeal from order rejecting application

No appeal lies, under section 10 of the Letters Patent, from an order of a single Judge of the High Court rejecting an application for review of judgment *Muhammad Naim-ul-lah Khan* v *Ihsan-ul-lah Khan* (4), *Piari Lal* v *Madan Lal* (5) and *Gajadhar Prasad* v *Nawab Maulvi Muhammad Abdul Majid* (6), followed

A second appeal on the list of a single Judge of the Court was dismissed by the following judgment :

"A preliminary objection is taken to the hearing of the appeal. This objection must in my opinion prevail. The facts are as follows. The judgment of the court below was dated the 16th of June, 1920. The period taken in obtaining the copy was from the 8th of September to the 10th of September, 1920. The appeal was presented on the 25th of October, 1920, the date on which the court re-opened after the vacation. The judgment of the appellate court was put in. The judgment of the first court was not put in. The judgment of the first court was put in on the 4th of February, 1921. Under the Full Bench decision in *Bhairon Ghulam* v. *Ram Autar Singh* (7), this appeal is time-barred. The respondent put in cross-objections. These of course are null and void as the appeal itself is time-barred. The result is that the appeal is dismissed with costs, not on the merits but as time-barred."

The appellant applied for a review, but his application was rejected for the reasons given below —

"This application can only be taken as an application for review of judgment. The learned counsel for the applicant ... here is nothing in my judgment of the 20th of July, 1923, to which he can take exception under the provisions of order XLVII, rule 1, and that he can only succeed by

* Appeal No. 32 of 1923, under section 10 of the Letters Patent.

(1) (1920) 20 A. L. J., 973
(2) (1923) I. L. R., 45 All., 380
(3) *Vide Supra* p. 530
(4) (1892) I. L. R., 14 All., 226
(5) (1916) I. L. R., 39 All., 191.
(6) L. P. A., No. 81 of 1921, decided on 9th February, 1923.
(7) (1921) I. L. R., 43 All., 660

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asking me to consider as a sufficient reason that his client, owing to ignorance of the law and the rules of the Court put up a defective petition of appeal and did not remedy the defect until the period of limitation had passed. I have grave doubts as to whether it would be possible to consider that in the circumstances there is sufficient reason within the meaning of order XLVII, rule 1, for admitting a review, and in no circumstances should I be disposed to admit such a review unless it were palpable to me that a grave injustice had been done to the applicant by not permitting him to proceed with the appeal. In order to satisfy myself on the latter point I have looked into the record of the case and I do not think that there is anything that could be called a grave injustice at all. True, it might be argued, that the lower appellate court had made a slight arithmetical error, but the error would be a very slight one. In those circumstances I do not consider myself justified in granting this application. I dismiss it with costs."

Thereupon the appellant filed the present appeal under section 10 of the Letters Patent.

Munshi *Bhagwati Shankar*, for the appellant.

This appeal was dismissed under order XLI, rule 11, of the Code of Civil Procedure.

BANERJI and GOKUL PRASAD, JJ. :—In our judgment no appeal lies in this case under section 10 of the Letters Patent. An appeal preferred to this Court was dismissed by a learned Judge. An application was made to have that order set aside and that application was treated as an application for review of judgment. The learned Judge rejected the application for review and from his order rejecting the application for review of judgment this appeal under the Letters Patent has been preferred. In order XLVII, rule 7, of the Code of Civil Procedure, it is provided that no appeal lies from an order rejecting an application for review of judgment and under order XLIII, rule 1, there is no provision for an appeal from an order rejecting such an application. Therefore, according to the Code of Civil Procedure, the order complained of in the present case is unappealable. It is contended that section 10 of the Letters Patent is wide enough to allow an appeal in a case of this kind. The whole question of appeals under the Letters Patent was considered by the Full Bench in the case of *Muhammad Naim-ullah Khan* v. *Ihsan-ullah Khan* (1). The same point was considered in *Piari Lal* v. *Madan Lal* (2), and in the recent case of *Gajadhar Prasad* v. *Nawab Maulvi Muhammad Abdul Majid* (Letters Patent Appeal No. 81 of 1921 decided on the 9th of February, 1923). In all these cases it was held that an appeal would not lie under the Letters Patent. The principle applied by this Court in these cases equally applies to the present case. Our attention was

(1) (1892) I. L. R., 14 All., 236.
(2) (1916) I. L. R., 39 All., 191.

drawn to the case of *Sadiq Ali* v. *Anwar Ali* (1). That case is distinguishable from the present and we do not consider that in that case any rule of law was laid down contrary to that enunciated in the rulings to which we have referred. In any case we are bound by the decision of the Full Bench reported in I L. R , 14 All., 226, and following that and the other cases to which we have referred, we must hold that no appeal lies. This appeal is accordingly dismissed.

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TIRMAL SINGH v. KANHAIYA SINGH.

Appeal dismissed.

MISCELLANEOUS CIVIL.

Before Mr Justice Piggott

1923 *March*, 20

ISHDAT TIWARI AND ANOTHER (PLAINTIFFS) v. TAMESHWAR TIWARI AND OTHERS (DEFENDANTS) *

Act No VII of 1870 (*Court Fees Act*), *section* 7(*v*), *schedule I, article* 1—*Court fee—Cross-objections—Suit to set aside a sale-deed—"Legal necessity"*

One of the issues in a suit to cancel a sale-deed and obtain possession of the property was as to what extent the sale was supported by legal necessity, and on appeal the lower appellate court found that as to part of the consideration, amounting to Rs 100 as 10, the sale had no legal necessity to support it, the suit, however, stood dismissed so far as the reliefs claimed were concerned The plaintiffs having appealed from the decree so far as it was against them, the defendants filed cross-objections taking exception to the finding as to this item of Rs 100 as 10

Held that an *ad valorem* court fee was payable in respect of the cross objections *Lakhan Singh* v *Ram Kishan Das* (2) and *Daroga Raut* v. *Musammat Parsma Kuer* (3), referred to

THIS was a suit by two plaintiffs for possession of a zamindari share by cancellation of a sale-deed executed in 1901 by the father (deceased) of plaintiff No. 1 and by defendant No. 7 (father of plaintiff No. 2) in favour of defendant No 1's ancestor. The first court held that plaintiff No. 1 had attained majority more than 3 years prior to suit and that therefore his suit was time-barred; that plaintiff No. 2 had no right to sue as he was not born at the date of the sale, and that the two plaintiffs were separate (although their fathers had been joint at date of sale), so that one plaintiff had no right to sue on behalf of the other. The suit was accordingly dismissed.

The lower appellate court disagreed with the first court on the issue of the age of plaintiff No. 1 and held that his claim was not barred by time; it agreed that plaintiff No 2 had no

* Stamp Reference in Second Appeal No 1553 of 1922

(1) (1922) I L. R , 45 All , 66.
(2) (1917) I L. R , 40 All , 93.
(3) (1918) 3 Pat L J , 197.

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claim; it agreed about the question of separation and held that one plaintiff had no right to sue for the share of the other plaintiff. On the question of legal necessity, the court allowed the claim of plaintiff No. 1 to the extent of Rs. 100-10-0; but held that he could not call in question the first two items (of the components of the consideration for the sale-deed) as he was born subsequently to them *i.e.* the earlier debts which formed the first two items. In other respects the appeal was dismissed with costs. The decree was:—"*Pas hukm hua ke appeal haza laqadr jawlad maliyat mabligh Rs.* 100-10-0 *bahaq appellant decree ho, baqiya appeal dismiss ho.*" The net result was that the claim for possession and cancellation stood dismissed, and there was a finding that Rs. 100-10-0, out of the consideration for the sale, was not supported by legal necessity.

The plaintiff appealed to the High Court and valued their appeal at Rs. 1,67[illegible]. The relief asked for was to decree the suit, and the court fee paid on five times the Government revenue was Rs. 11-4-0.

The defendants filed cross-objections; relief:—to modify decree of court below and to dismiss the suit. They valued their cross-objections at Rs. 100-10-0 for purposes of jurisdiction, and Rs. 19-6-0 (five times Government revenue of one pie share) for payment of court fees.

The cross-objections attacked the finding as to the first plaintiff's age, and also the finding that Rs. 100-10-0 was not for legal necessity. They asserted that "the decree is indefinite and has erred in determining that the amount for which the sale ought to have been set aside was Rs. 100-10-0."

The Stamp Reporter took exception to the court fee paid on the memorandum of objections:—"Court fee on memorandum of cross-objections is payable on the value of the subject matter in dispute, *vide* a well-known ruling of this Hon'ble Court reported in I. L. R., 40 All., 93, and not on five times Government revenue of the property in dispute."

To this report Pandit *Brijmohan Lal Dave*, for the respondents, replied:—"The ruling in I. L. R., 40 All., 93 does not apply to the present cross-objections, for in that case the question arose under article 17 of schedule II of the Court Fees Act, which article does not relate to cross-objections filed in the classes of suits mentioned therein. It merely lays down that on all cross-objections court fee is to be paid under article 1, schedule I of the Court Fees Act, *i.e.*, "*ad valorem* fee accord-

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The subject matter in dispute in the present cross-objections is "right to the possession of one pie share" in mauza Kantha Sasna which appears to have been decreed to the plaintiff by the court below.

The words the "value of the subject matter in dispute" must be construed in the same sense for all of the following, mentioned in column 1 of the schedule I:—

(*a*) "plaint",

(*b*) "written statement pleading a set off or counter claim",

(*c*) "memorandum of appeal",

(*d*) "cross-objections",

And in cases like the present, "such value shall be deemed to be, where the subject matter is land and where the land forms . . . a definite share of an estate paying annual revenue to Government . . . and such revenue is settled but not permanently, *five times the revenue so payable*," *vide* clause (v), section 7, of the Court Fees Act

Accordingly court fee has been paid on the memorandum of appeal in this case on a valuation of the subject matter in dispute calculated at five times the Government revenue. And similarly the cross-objections, which are also governed by the same article, should bear court fee on valuation similarly calculated

The valuation for purposes of jurisdiction is calculated according to the Suits Valuation Act and is meant also for the calculation of fees of the counsel appearing in the case and has no reference to the valuation of the subject matter for purposes of the court fee, for which a separate rule has been provided under the Court Fees Act. The appeal is also similarly valued for purposes of jurisdiction at Rs 1,693-6-9.

The question is of general importance which may be decided by the Taxing Officer and, if necessary, referred to the Taxing Judge. I would like to be present when the matter is laid before the Taxing Officer"

The case was then submitted to the Taxing Officer:—

"The chief contention of the learned counsel is based on section 7, clause (v), of the Court Fees Act as well as on section 8 of the Suits Valuation Act. But my point is that these sections relate only to suits or appeals and not to cross-objections Article 1, schedule I, is admittedly applicable, but that does not help him, because it lays down very distinctly that an

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ad valorem court fee is leviable on the subject matter in dispute. The case is clearly governed by authorities reported in I. L. R., 40 All., 93, and in 3 Pat. L. J., 197. So long as these rulings stand as they are, there can be no escape from the payment of an *ad valorem* court fee on the subject matter in dispute in cross-objections, that is to say, on the jurisdictional value of the same."

The Taxing Officer referred it to the Taxing Judge:—

"Today I have heard what the learned counsel and the Stamp Reporter have to say re. office this matter. Admittedly article 1, schedule I, of the Court Fees Act applies to this cross-objection, and admittedly, in accordance with the rulings in *Lakhan Singh* v. *Ram Krishan Das* (1) and in 3 Pat. L. J., 197, this cross-objection must pay an *ad valorem* court fee. But the question then arises what such *ad valorem* fee should be. The learned counsel's contention is that, since it is a matter of land in dispute, the *ad valorem* fee should be reckoned in accordance with section 7, clause (v), of the Court Fees Act, and not on the jurisdictional value of the cross-objection. This is an intelligible line of argument, and it is a point which does not seem to me to be fully covered by the rulings above quoted. The amount of court fee at issue in the present case is small, but the question is an important one, and in order to enable me to deal with such cases in the future I shall be grateful for a ruling from the Hon'ble Taxing Judge, before whom therefore this should be laid."

The Taxing Judge passed the following order:—

PRATT, J.:—I have considered the office report and the arguments of counsel. The cross-objections are admittedly liable to an *ad valorem* fee on the subject matter in dispute. This can only be ascertained by an examination of the decrees passed by the courts below. The first court dismissed the plaintiffs' suit: the lower appellate court gave the plaintiff Ishdat a decree "*ba qadr jardad maliyat mubligh* Rs. 100-10-0." The defendants in their petition of cross-objections ask for the restoration of the first court's decree. I hold that the value of the subject matter in dispute on their petition of cross-objections is Rs. 100-10-0: they must pay an *ad valorem* fee on this amount. I allow them one month within which to make good the deficiency.

APPELLATE CRIMINAL.

Before Mr Justice Walsh and Mr. Justice Ryves

EMPEROR *v.* ZAWAR HUSAIN *

1923 *March*, 21.

Act (Local) No IV of 1910 (*United Provinces Excise Act*), *section* 60A—*Principal and agent—Possession held to be with principal for the purposes of a penal statute, though actual custody with agent*

A man is not ordinarily liable for the criminal acts of his agent, except in those cases where, being authorized to traffic in prohibited goods under a licence and subject to restrictions, he puts a servant in to carry on the business for him and his servant acts outside the restrictions *Il mens rea* is relevant, it must be shown that the principal had knowledge But there may be, and often is in commercial dealings, possession other than that which may be called strict legal possession, for the purposes of a preventive statute Control or dominion may amount to criminal possession, although actual legal possession, such as that of a bailee, or an agent, may be in another

Emperor v *Gajadhar* (1) and *Emperor* v *Ghulam Husain* (2), referred to

THE facts of this case are fully set forth in the judgment of the Court

Babu *Lalit Mohan Banerji* (Government Advocate), for the Crown.

Mr. *G. W Dillon*, for the accused

WALSH and RYVES, JJ. :—This is a Government appeal against the acquittal of one Zawar Husain, on a charge tried by a First Class Magistrate of Saharanpur, for "possessing cocaine" without lawful justification. No lawful ground for the possession, if any, was suggested.

The case presents another example of the sort of travesty of justice of which this Court has had too much reason to complain, of late, in magisterial proceedings. The case lies in a small compass The first witness was called on the 27th of March, within eight days of the date of the alleged offence. The last witness was not called till about the 7th of July, and the judgment was delivered on the 31st of July, after what must have been an enormous expenditure of money and magisterial time. We have been compelled to go through a mass of irrelevant matter, and a judgment consisting of twelve closely printed pages of wearisome discussion of superfluous details and laborious reflections on side-issues, of no importance to any one, in which the real issue has been almost totally obscured.

The prosecution made the initial error of trying to establish that Zawar Husain lived on the premises; an issue which was bound to fail, and which undoubtedly accounts for much of the

* Criminal Appeal No 114 of 1923, by the Local Government, from an order of S M Zahid, Magistrate, First Class of Saharanpur, dated the 31st of July, 1922

(1) (1903) I L R, 25 All, 262
(2) (1918) I L R, 40 All, 420

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waste of time, for which the Magistrate was not responsible. The Magistrate, in the end, decided that Zawar Husain did not live on the premises, and that he had no knowledge of the cocaine which was seized. As to the former of these issues, it is clear that he was right. As to the latter, we differ from the decision. We think that it is clearly established that Zawar Husain used the house for concealing cocaine, and that if he had been charged under 60-A of the United Provinces Excise Act, 1910, as amended by Act No. IV of 1919, he must have been convicted. The Government Advocate asked for a conviction under this section, but the accused was not charged under it, nor was this Court asked in the notice of appeal to alter the charge. Mr. *Dillon*, who represented the accused, and argued his case with great force and fairness, objected on substantial grounds of hardship to this course. We are of opinion that we ought not now to try the accused on a fresh charge.

The question, therefore, which we have to decide is, whether the finding that Zawar Husain was not in possession of the cocaine seized was one at which the Magistrate has arrived against the weight of the evidence.

The material facts are simple and clear. On his own showing, Zawar Husain is a notorious trafficker in cocaine. He has already been in prison for illicit dealing. He would have us believe that he is now a reformed character, and has been helping the authorities to catch other offenders. It may be so. The fact is not inconsistent, either with his guilt, or with his innocence in this case. He is a joint-owner, if not the leading, member of his family, which lives either in or around the house raided. He is the owner, either in whole, or in part, of the house, which he had let on an agreement in writing to his brother-in-law, from year to year, and went through the quite unnecessary formality of getting it registered. He lived in another house close behind, a few yards away, and was naturally an occasional, if not a frequent, visitor to his brother-in-law. The unusual course, with a near relative and neighbour, was taken of putting the agreement of tenancy into precise terms in writing, and by it Zawar Husain reserved to himself a locked apartment containing some of his goods. Bashir Husain, the tenant, was called for the defence and swore that he and his brother-in-law were not on visiting terms. This is quite incredible.

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One Gopal Narain, whom the Magistrate has criticized severely, and who was responsible for the allegation that the accused lived in the house, had reported that cocaine was hidden in the house, which he believed to be the residence of Zawar Husain. Mr. Young, Superintendent of Police, went on the 20th of March, with a large body of officials and constables, and raided the house. As he approached the place in a motor-car, Gopal Narain pointed out to Mr. Young that Zawar Husain was seated at a mosque situated in one of the angles of the sort of a square which included the house to be raided and the house of the accused. Mr. Young's attention was distracted by the traffic, and he was not able to look in the direction indicated. But it is inconceivable that Gopal Narain would have risked an idle falsehood, having no reason to know that accused was not at the house to be visited, or had not made off, as he afterwards, disguised as a woman, tried to do It is, therefore, certain that the accused was sitting near by.

Outside the house raided eight persons were found seated. These included the tenant and brother-in-law of the accused, two of his brothers, one of whom lived also at the house, and, significantly enough, the accused's *karinda*. Inside the house were certain female members of the family. Much time has been wasted over the question whether one was the wife or mistress of the accused, and over the identity of one who was shortly afterwards delivered of a child. These questions only bear on the issue whether the house was the residence of the accused. But, after a long and elaborate search, a considerable quantity of cocaine (9 oz. 6 grains), said to be worth about Rs. 1,800, was discovered in the false bottom of a large box, in a room chained from the inside, and occupied, at the moment, by one of the females. Zawar Husain had been sent for, but he deliberately kept away. He was in the immediate neighbourhood, and his conduct shows that he knew there was good reason for dissociating himself from the results of the search. An innocent man would naturally be anxious to assist the authorities, and to satisfy them of his *bona fides*. Letters addressed to the accused were found in the house

The box in which the cocaine was secreted was a very large and heavy one, the presence of which in the house must have been known to the occupants. It was designed to prevent the discovery of its secret contents and not to promote it. This destroys the feeble suggestion of the defence that it had been

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planted on the people of the house by their enemies; enemies would scheme that cocaine should be found, and not a box which almost defied discovery of its contents. The box had not even the tempting attractions of the wooden horse of Troy, and the conduct of the tenants in concealing and guarding it is inconsistent with its suggested character of an unwelcome intruder. The enemies of Zawar Husain would hardly plant a box in a house, which, according to him, every one, except Gopal Narain, knew was not his residence. The time, moreover, to acquaint the authorities with the wicked trick which had been played upon them was when Mr. Young and his party arrived to search. The box, [illegible] housed and guarded, was indeed surrounded by the family and agents of the accused. It is not suggested that any of them was able to obtain and trade in cocaine to this extent; Bashir was paying a rent, if he paid any, of Rs. 5 per month; and the inference from all these circumstances is irresistible that the box was being kept for Zawar Husain in the house of his brother-in-law, in whose actual physical possession it was.

We have perused the mass of defence evidence without finding anything satisfactorily established which is inconsistent with this view. It is not possible to say that Zawar Husain was the sole owner, or the true owner. Bashir Ud-din, the tenant and brother-in-law, swore to a new and [illegible] story that one Buddhoo had suddenly deposited the box there, the night before, as part of his luggage. This mysterious individual was expected to follow up this advance guard by arriving in force with the rest of his luggage, "later on." But nothing more seems to have been heard of him. The notion that a man would abandon nearly Rs. 2,000 worth of cocaine to its fate in this way, requires more evidence than this to satisfy us of its truth. The *onus* was clearly thrown on the accused to prove the true ownership, or at least to account for its presence in the custody of his relative and tenant, and he has failed to do either.

Mr. *Dillon's* view of the law applicable is perfectly sound. A man is not ordinarily liable for the criminal acts of his agent, except in those cases where, being authorized to traffic in prohibited goods under a licence, and subject to restrictions, he puts a servant in to carry on the business for him, and his servant acts outside the restrictions. If *mens rea* is relevant, it

may be, and often is in commercial dealings, possession other than that which may be called strict legal possession, for the purposes of a preventive statute such as this. Control, or dominion, may amount to criminal possession, although actual legal possession, such as that of a bailee or an agent, may be in another. In *Emperor* v. *Gajadhar* (1), opium found in the house of a neighbour of the owner, who had left it with the neighbour for the night for safe keeping, was held to be in the possession of the owner. In *Emperor* v. *Ghulam Husain* (2), the owner of firearms, who held a licence to carry arms, had died. His widow and his minor son continued to live in the house where the firearms were kept The mother was the legal owner and the manager of the house. There was ground for holding that the youth had cleaned and looked after them, if he had not actually used them It was held that the son was rightly convicted of being in possession of them without a licence.

We, therefore, allow the appeal, and convict Zawar Husain of having been in unlawful possession of these 9 oz. of cocaine

It is a bad case, not merely because of the amount seized, and on account of the previous conviction, but also on account of the nature of the defence set up. We, therefore, sentence Zawar Husain to 2 years' rigorous imprisonment from the date of his surrender to his bail, or arrest in the event of his failing to surrender, whichever happens first.

Appeal allowed.

APPELLATE CIVIL.

Before Mr Justice Lindsay and Mr Justice Sulaiman

1923 *April*, 4.

RAM CHANDAR AND ANOTHER (PLAINTIFFS) v. MUHAMMAD NUR AND OTHERS (DEFENDANTS) *

Hindu law—Joint Hindu family—Simple money decree against father—Joint ancestral property sold in execution—Son's rights to recover property which has passed out of the family

Where in execution of a simple money decree against the father of a joint Hindu family the joint ancestral property of the family has been sold by auction and has passed out of the possession of the family, the sons cannot question the sale unless they can show that the simple money debt was illegal or tainted with immorality

* Second Appeal No 360 of 1922, from a decree of A G P Pullan, District Judge of Benares, dated the 25th of January, 1922, reversing a decree of Hanuman Prasad Varma, Additional Munsif of Benares, dated the 1st of December, 1921

(1) (1903) I L R, 25 All, 262
(2) (1918) I L R, 40 All, 420

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Sripat Singh Dugar v. *Prodyot Kumar Tuware* (1), *Girdharee Lall* v. *Kantoo Lall* (2), *Hanmant Kashinath Joshi* v. *Ganesh Annaji Pujari* (3) and *Bhara' Singh* v. *Sarsuti Singh* (4), referred to.

THE facts of this case are fully stated in the judgment of the Court.

Munshi *Gulzari Lal*, for the appellants.

Dr. Kailas Nath Katju, for the respondent.

LINDSAY and SCHAIMAN, JJ.:—This is a plaintiffs' appeal arising out of a suit brought by the two minor sons of Suraj Prasad for a declaration that they are the owners of a two-thirds share in the house in dispute, which was sold at auction in execution of a simple money decree against the father. It appears that Suraj Prasad executed a simple money bond on the 6th of May, 1913, in order to pay interest on a previous mortgage-deed. A suit was brought by the obligee on the basis of the bond and a decree was obtained against Suraj Prasad. In execution of that decree the house in question was attached and was put up for sale and purchased by the decree-holder himself namely, Pahlad Das. In spite of getting a formal delivery of possession Pahlad Das was dispossessed and he had to bring a separate suit for the possession of the house, which was decreed in 1919. On the 2nd of June, 1919, Pahlad Das executed a sale-deed of the property in question in favour of Janki Pande, which sale was pre-empted by Haji Muhammad Nur, the present respondent. Haji Muhammad Nur obtained the pre-emption decree on the 27th of March, 1920, and has been in possession of the house since. The present suit was brought by the sons on the allegation that the debt, to recover which the property was sold at auction, was without any legal necessity and that in fact it was tainted with immorality.

The court of first instance found that the house was the ancestral property of the family and that the sons not having been made a party to the previous litigation, their interest in the house was not affected. It accordingly decreed the claim, exempting a two-third share of the house from the operation of the sale

On appeal the learned District Judge, finding that the debt was not tainted with immorality, set aside the decree of the first court and dismissed the suit *in toto*.

(1) (1916) I. L. R., 44 Calc., 534.
(2) (1874) L. R., 1 I. A., 321.
(3) (1918) I. L. R., 43 Bom., 612
(4) (1920) 60 Indian Cases, 137.

The plaintiffs come up in second appeal to this Court, and on their behalf it is contended, on the authority of the cases of *Sahu Ram Chandra* v. *Bhup Singh* (1) and *Chet Ram* v. *Ram Singh* (2), that the sons' interest cannot be affected by the previous sale proceedings. We are of opinion that neither of the two cases relied upon by the learned advocate for the appellants supports that contention. It was remarked by their Lordships of the Privy Council in *Sripat Singh Dugar* v. *Prodyot Kumar Tagore* (3), that by the *Mitakshara* law "a judgment against the father of the family cannot be executed against the whole of the *Mitakshara* property if the debt in respect of which the judgment has been obtained was a debt incurred for illegal or immoral purposes. In every other event it is open to the execution creditor to sell the whole of the estate in satisfaction of the judgment obtainable against the father alone."

In the present case the rights of third parties have come into existence inasmuch as the property was sold by public auction in execution of a simple money decree, passing not only the interest of the father but that of the whole family; and subsequently the auction-purchaser transferred it by sale which has been pre-empted by the principal respondent. The sons cannot now question the auction sale unless they can show that the simple money debt was illegal or tainted with immorality. We need only refer to an earlier pronouncement of their Lordships made in the case of *Girdharee Lall* v. *Kantoo Lall* (4), that "where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt or in order to raise money to pay off an antecedent debt, *or under a sale in execution of a decree for the father's debt*, the sons cannot recover that property unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted."

The comment made on this pronouncement by Sir JOHN STANLEY in the case of *Chandradeo Singh* v. *Mata Prasad* (5), and recently approved by the Privy Council, was to the effect that this proposition deals with the cases in which ancestral

(1) (1917) I. L. R., 39 All., 437.
(2) (1922) I. L. R., 44 All., 368.
(3) (1916) I. L. R., 44 Calc., 624
(4) (1874) L. R., 1 I. A., 321.
(5) (1909) I. L. R., 31 All., 176.

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property has passed out of the family, and with no other cases. Even in the case of *Sahu Ram Chandra* v. *Bhup Singh* (1), their Lordships at p. 446 remarked :—

"A perusal of the numerous authorities will show that where a joint family property has been sold out and out, or where a decree in execution of the mortgage has been obtained against the property, and rights have thus sprung up with regard to the joint family estate, those rights are not to be defeated by the members of the joint family simply questioning the transaction entered into by its head."

We may also point out that in the case of *Chet Ram* v. *Ram Singh* (2), their Lordships laid special stress on the circumstances that the case was a singularly clear one because it was not affected by other considerations such as the property having been publicly sold, and there were no rights of auction-purchasers to be considered. We are supported in this view by the Bombay High Court in the case of *Hanmant Kashinath Joshi* v. *Ganesh Annaji Pujari* (3), and by the Oudh Judicial Commissioner's Court in the case of *Bharat Singh* v. *Sarasti Singh* (4). The appeal accordingly fails and is hereby dismissed with costs.

Appeal dismissed.

REVISIONAL CIVIL.

1923
April, 11.

Before Justice Sir Pramada Charan Banerji and Mr. Justice Gokul Prasad.

SITAURAN BIBI AND ANOTHER (APPLICANTS) v. ABDUS SAMAD AND OTHERS (OPPONENTS).*

Civil Procedure Code, order XXXIII, rule 5, clause (d)—Application for leave to sue in forma pauperis—Grounds upon which a court may reject application—Inquiry into merits of suit before decision as to fate of application—Procedure.

Clause (*d*) of rule 5 of order XXXIII of the first schedule to the Code of Civil Procedure enables the court to reject an application for leave to sue as a pauper, if, upon the allegations made by the applicant in the plaint or in his deposition as recorded under rule 4, no cause of action is shown. But it does not empower the court to try the question of the plaintiff's title after taking evidence on that question and in fact to try the suit on the merits before the application for leave to sue is granted. *Jugendra Narayan Ray* v. *Durga Charan Guha Thakurta* (5) and *Charu Sila Dasi* v. *Haran Chandra Mukerjee* (6), referred to. *Kamaksh Nath* v. *Sundar Nath* (7), distinguished.

THE facts material to the case are stated in the judgment of the Court

* Civil Revision No. 117 of 1922.

(1) (1917) L. R., 39 All., 437.
(2) (1923) I. L. R., 44 All., 368 (373).
(3) (1918) I. L. R., 43 Bom., 612.
(4) (1920) 60 Indian Cases, 137.
(5) (1918) I. L. R., 46 Calc., 651.
(6) (1919) 50 Indian Cases, 520.
(7) (1898) I. L. R., 20 All., 293.

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Briefly, they are as follows :—

Shauran Bibi and Abdul Hamid applied to the Subordinate Judge for permission to sue as paupers for possession of some property left by Abdul Ghani. The defence was that Abdul Hamid was not the son of Abdul Ghani, that plaintiffs had no subsisting title, and, in any case, they were not paupers.

Notice was issued to the Government Pleader, who did not oppose the application

The Subordinate Judge took evidence in the case and held that plaintiffs had no subsisting title nor were they paupers.

The applicants applied in revision to the High Court.

Munshi *Shiva Prasad Sinha* (for the applicant), submitted that the court below had gone wrong in entering into such a minute inquiry and prejudging the case. Order XXXIII of the Code of Civil Procedure laid down the procedure in such cases. Rule 4 said :—" The court may examine the applicant." Rule 5, clause (*b*), said that the application was to be rejected when " the applicant is not a pauper." But the question of pauperism was to be determined on the examination of the applicant himself, as stated in rule 4 Rule 5, clause (*d*), said :—" Where *his* allegations do not show a cause of action." By his allegations were meant allegations in the plaint or in his deposition His allegations could not mean the allegations of the witnesses. Rule 6 expressly said that evidence might be adduced on the question of pauperism. It did not say on the question of title. Rule 7 said that the court might examine the witnesses produced by either party. But this was governed by rule 6 which clearly said that it should be on the question of pauperism. The court below had, therefore, absolutely no jurisdiction to embark upon such an elaborate inquiry. He relied upon *Jogendra Narayan Ray* v. *Durga Charan Guha Thakurta* (1), *Gopal Chandra Neogy* v *Bigoo Mistry* (2) and *Govindasami Pillai* v. *Municipal Council, Kumbakonam* (3). On the question of pauperism the court below had not come to any finding at all It merely said that the applicant Shauran Bibi owned two sewing machines and, therefore, she was not a pauper. The sewing machines might be worth Rs. 100 at the most. But in this case the court fee was Rs. 295. Order XXXIII, rule 1, said that a pauper was one who could not pay full court fee This the court had not found.

(1) (1918) I. L. R., 46 Calc., 651
(2) (1903) 8 C. W. N., 70.
(3) (1917) I. L. R., 41 Mad., 620

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Munshi *Haribans Sahai* (with him Mr. *Sankar Saran*), for the respondent, submitted that the court below was perfectly within its rights in going into an inquiry and examining witnesses in order to find out whether the applicants' allegations showed a cause of action. He referred to *Rustamji and Co.* v. *Husain Khan* (1).

Order XXXIII, rule 7, said :—" The court shall examine the witnesses (if any) produced by either party." This clearly showed that the intention of the Legislature was not to restrict the matter to the allegations made in the plaint or the examination of the applicant. He cited *Charu Sila Dasi* v. *Haran Chandra Mukerjee* (2), *Kamrakh Nath* v. *Sundar Nath* (3) and *Chattarpal Singh* v. *Raja Ram* (4). The Madras case relied upon by the other side did not consider the earlier pronouncement made by the same Court in *Amirtham* v. *Alwar Manikkam* (5). On the question of pauperism when the court found that the applicants were not paupers, it meant that they were in a position to pay the full court fee. It could not be said that the court did not know the definition of a " pauper " as one who " is not possessed of sufficient means to enable him to pay the fee prescribed by law for the plaint in such suit."

Lastly he submitted that even if the court below went wrong, it was only an error of law. There was no question of jurisdiction involved in the case and so the present application for revision did not lie under section 115 of the Code of Civil Procedure.

Munshi *Shiva Prasad Sinha*, replied.

BANERJI and GOKUL PRASAD, JJ. :—This is an application for the revision of an order of the Subordinate Judge of Gorakhpur dismissing the application made by the applicants for leave to sue as paupers. The claim was one for recovery of immovable property by right of inheritance. One of the defendants disputed the title of the plaintiffs to maintain the suit and also denied that the plaintiffs were paupers. The court below took evidence upon the question of the plaintiffs' title, and after considering that evidence came to the conclusion that the plaintiffs had no right to maintain the suit. It also was of opinion that the plaintiffs' pauperism had not been established.

(1) (1913) 18 Indian Cases, 491.
(2) (1910) 60 Indian Cases, 520.
(3) (1898) I. L. R., 20 All., 269.
(4) (1885) I. L. R., 7 All., 661
(5) (1908) I. L. R., 37 Mad., 37.

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On these grounds the application was rejected. The first contention before us is that the court in proceeding to try the question of the plaintiffs' title exercised a jurisdiction not vested in it by law. In our opinion this contention is well-founded. Order XXXIII of the first schedule to the Code of Civil Procedure lays down the procedure to be followed upon an application being presented to the court for leave to sue as a pauper. Rule 5 of that order specifies the grounds upon which the application may be rejected, and one of those grounds, as mentioned in clause (*d*) of the rule, is that the allegations do not show a cause of action. Rule 6 provides that if the court does not reject the application on any of the grounds mentioned in rule 5, it should proceed to take evidence upon the question of pauperism. The only matter in regard to which evidence may be taken is the question of pauperism, as provided in rule 6. Rule 7 provides that on the day fixed arguments may be heard and the evidence produced may be considered and the court may grant or refuse the application. The only matter in regard to which evidence may be taken is, as stated above, that mentioned in rule 6, that is to say, the question of the pauperism or otherwise of the applicant. In our opinion, clause (*d*) of rule 5 enables the court to reject the application if, upon the allegations made by the applicant in the plaint or in his deposition as recorded under rule 4, no cause of action is shown. It does not empower the court to try the question of the plaintiff's title after taking evidence on that question and in fact to try the suit on the merits before the application for leave to sue is granted. In our opinion if, upon the allegations contained in the plaint and in the deposition of the plaintiff as recorded under rule 4, it appears to the court that the plaintiff has no cause of action for maintaining the suit, the application may be rejected, but we do not think that the law contemplates that there should be a regular trial of the question of title upon taking evidence from both parties before the application is granted or refused. It would be prejudging the case if such evidence were taken. This view is in consonance with the decision of the Calcutta High Court in *Jogendra Narayan Ray* v. *Durga Charan Guha Thakurta* (1). Our attention has been drawn to a ruling of the Patna High Court in *Charu Sila Dasi* v. *Haran Chandra Mukerjee* (2). If

(1) (1918) I. L. R. 46 Calc., 651.

(2) (1919) 50 Indian Cases, 590

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the learned Judges who decided that case intended to lay down the rule that, in order that the court may be satisfied that the plaintiff has a subsisting cause of action, the court may take evidence upon the merits of the case, we are unable, with great respect, to agree with them. The learned vakil for the opposite party relied upon the decision of this Court in *Kamrakh Nath* v. *Sundar Nath* (1). That case is, in our opinion, distinguishable from the present case. In that case what was held was that the court should reject the application if on the statements which are placed before the court it appears that the plaintiff has no subsisting right of suit. It was not held in that case that the court might take evidence for the purpose of determining whether the plaintiff had the alleged right of suit. That was not a case in which any evidence had been taken. Apparently the plaintiff was examined and upon a consideration of the statements made by him in his examination the court came to the conclusion that no right to bring the suit was shown. That case, therefore, does not afford us any guide in the matter now before us. An earlier Full Bench ruling of this Court in *Chattarpal Singh* v. *Raja Ram* (2) was referred to by the learned Judges in their judgment. There the question was whether the only point upon which the court could refuse the application was the absence of jurisdiction to entertain the suit. According to the wording of clause (*d*) of rule 5 of the present Code no question of jurisdiction can arise. What has to be seen is whether upon the allegations made by the plaintiff, that is the allegations contained in the plaint and in the plaintiff's examination under rule 4, a cause of action is disclosed. If those allegations did not show a cause of action, the court was bound to reject the application. But, in our judgment, the court is not entitled to take evidence from the parties upon the question of the plaintiff's title before coming to the conclusion whether it would grant or refuse the application. We think that, in the present case, in taking evidence on the question of title the court exercised a jurisdiction not vested in it by law.

As to the pauperism of the plaintiffs the court below makes some general observations to the effect that the pauperism of the plaintiffs was not proved. The court did not consider the evidence placed before it upon the question whether the plain-

(1) (1898) I. L. R., 20 All., 299.
(2) (1885) I. L. R., 7 All., 661.

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tiffs had the means to pay the amount of court fee requisite for the institution of the suit. The learned Subordinate Judge said that in another suit the plaintiff had paid a large fee to a certain pleader. It also said that she owned two sewing machines; but it did not consider the value of the sewing machines, nor did it consider any point about the means of the plaintiffs to pay the requisite amount of court fee. In our opinion the question of pauperism was not tried by the court below. Therefore we hold that in trying the question of title the court exercised a jurisdiction not vested in it by law, and in not trying the question of the plaintiffs' pauperism it did not exercise the jurisdiction which was vested in it. We accordingly allow the application, set aside the order of the court below and send back the case to that court in order that the question of the pauperism of the applicants may be determined. We may mention that when notice was issued to the Government pleader as to the pauperism of the plaintiffs, no objection was put forward on behalf of the Government. This was a matter which the court should also have taken into consideration. Costs here and hitherto will be costs in the cause.

Application allowed.

REVISIONAL CRIMINAL.

Before Mr. Justice Daniels.

1923
April, 12.

AZIZ AHMAD v. BUDDHU KHAN AND OTHERS.*

Criminal Procedure Code, section 522—Order for restoration of property refused by trial court—Revision—Jurisdiction of High Court.

Where a trial court, in the exercise of the discretion conferred upon it by section 522 of the Code of Criminal Procedure, has declined to pass an order under that section for the restoration of property, a court of appeal or revision cannot compel it to do so, nor will such court ordinarily, even if it has the power to do so, pass an order under section 522 itself. *Bhagabat Shaha* v. *Sadique Ostagar* (1) and *Muhammad Din* v. *The Crown* (2), referred to.

THIS was an application in revision from an order of the Sessions Judge of Kumaun refusing to make an order under section 522 of the Code of Criminal Procedure for the restoration of certain property to the applicant.

* Criminal Revision No. 125 of 1923, from an order of L. Johnston, Sessions Judge of Kumaun, dated the 1st of December, 1922.

(1) (1912) I. L. R., 39 Calc., 1050.

(2) (1919) Punjab Records (Criminal Judgments), p. 36.

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The facts of the case, so far as they are necessary for the purposes of this report, appear sufficiently from the order of the Court.

Munshi *Sheo Dyal Sinha*, for the applicant.

Babu *Piari Lal Banerji*, for the opposite parties.

DANIELS, J.:—This is an application in revision asking this Court to make, under section 522 of the Code of Criminal Procedure, an order for the restoration of property, which the trial court has refused to make. The discretion to pass or not to pass such an order is very clearly vested in the trial court by the section, which says that the court may pass such an order *if it thinks fit*. I know of no case in which a court of appeal or revision has compelled a court to pass such an order in a case in which, in the exercise of its discretion, it has declined to do so. Indeed there is the authority of two High Courts, those of Calcutta and the Punjab, for the view that a court of appeal or revision has no power to do so. This was held by the Calcutta High Court in the case of *Bhagabat Shaha* v. *Sadique Oslagar* (1), and by the Punjab High Court in *Muhammad Din* v. *The Crown* (2). Even if this Court in revision has power to pass the order applied for, there are no such exceptional circumstances in this case as would justify such action. I dismiss the application.

Application dismissed.

REVISIONAL CIVIL.

1923

April, 19.

Before Mr. Justice Daniels.

DEVI PRASAD (DECREE HOLDER) v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL (CONVICTOR).*

Civil Procedure Code, section 60 (1) (k)—Act No. IX of 1897 (Provident Funds Act), section 2(4) Provident Fund not attachable after retirement of subscriber and before withdrawal by him.

A deposit in a provident fund, which so long as the subscriber was in service was a compulsory deposit within the meaning of section 2(4) of the Provident Funds Act, 1897, is not attachable by a creditor after the subscriber retired and before he has drawn the deposit. *Veerchand Nawlu* v. *B. B. and C. I. Ry.* (3) and *Hindley* v. *Joynarain Marwari* (4), followed. *Nagindas Bhukhandas* v. *Chelabhai Gulabdas* (5), referred to.

* Civil Revision No. 14 of 1923

(1) (1912) I. L. R., 39 Calc., 1050.

(2) (1919) Punjab Records (Criminal Judgments), p. 36.

(3) (1904) I. L. R., 29 Bom., 259.

(4) (1919) I. L. R., 46 Calc., 962

(5) (1918) I. L. R., 44 Bom., 873.

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DEVI PRASAD v. THE SECRETARY OF STATE FOR INDIA IN COUNCIL.

THE facts of the case, briefly stated, were as follows.—In execution of decrees obtained against a Government employee, who had joined the General Provident Fund as an optional subscriber within the meaning of Rule 2 (*a*)* of the Rules regulating the General Provident Fund, the decree-holder sought to attach the amount accumulated to the credit of the employee in the Fund. Meanwhile the employee had retired from service and the amount was lying in the hands of the Account Officer pending withdrawal by the employee. On the application for attachment, an objection was made on behalf of the Government that the amount of the Fund was not attachable under Act IX of 1897. The court allowed this objection. Hence this revision.

Babu *Indu Bhushan Banerji*, for the applicant, contended that section 2, clause (4), of Act IX of 1897 did not apply to the facts of this case and the fund in question was attachable. He distinguished the ruling in I. L. R., 29 Bom., 259, on the ground that the fund concerned in that case was the Railway Provident Fund to which the employees of the Railway were bound to contribute as a matter of course, whereas the fund in question here was entirely of an optional nature, and was open to officers in both pensionable and non-pensionable posts. The Railway Provident Fund was something in the nature of a pension, whereas the fund in question was not so, but was a sort of an accumulation over and above the pension. The man concerned in this case was drawing a pension.

He next referred to Rule 10† of the Rules regulating the General Provident Fund and contended that the very rules of this fund contemplated an attachment such as was sought in this case

* Rule 2(*a*).—"Officers in whose case subscription to an existing service fund is optional, or who are not entitled to subscribe to such a fund, will be permitted to join the General Provident Fund as optional subscribers at any time."

† Rule 10.—"The amount which accumulates to the credit of a subscriber in permanent employ will, when he quits the service, become his property, and will be handed over to him, unless the Account Officer has received notice of an attachment, assignment, or encumbrance affecting the disposal of the amount or any portion of it. Should such notice have been received, the Account Officer will hand over to the subscriber only that portion of the amount which is not affected by the attachment, assignment, or encumbrance and shall obtain the orders of the Comptroller and Auditor-General as Administrator of the fund, regarding the disposal of the balance."

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He further pointed out the fact that according to Rule 20* a subscriber was allowed a temporary advance, in cases of urgent necessity, out of the amount accumulated in the fund, at the discretion of the sanctioning authority. The subscriber was also allowed, under Rule 21, to make payments towards a policy of insurance, or to any other recognized family pension fund, out of this fund.

For these reasons the fund did not come exactly under the description of "compulsory deposit" within the meaning of section 2, clause (d), of Act IX of 1897, and was therefore attachable. All the reported cases contemplated a fund of a compulsory nature and there was no case in which this particular fund had been taken into account or dealt with.

The Government Advocate (Babu *Lalit Mohan Banerji*), for the opposite party was not called upon.

DANIELS, J. :—This is a revision from an order of the learned Judge of the Small Cause Court, Allahabad. The point for decision before him was whether a deposit in a provident fund, which so long as the subscriber was in service was a compulsory deposit within the meaning of section 2 (d) of the Provident Funds Act (Act IX of 1897) became attachable by a creditor the moment the subscriber retired. The subscriber, in this case, has retired but has not yet drawn his deposit. The learned Judge of the court below has followed the decision in *Veerchand Nowla* v. *B. B. and C. I. Railway* (1), and has held that the deposit is not attachable. The learned Judges took the view that "compulsory deposit" in the Act was a term with a technical meaning and that a deposit which came within the definition remained a compulsory deposit until it was actually drawn out. The subscriber's retirement made no difference to its nature. The same view as was held in Bombay has been taken by the High Court of Calcutta in

* Rule 20—"(1) No final withdrawal will be allowed until the subscriber is quitting the service or dies. But when the pecuniary circumstances of a subscriber are such that the indulgence is absolutely necessary, a temporary advance not ordinarily exceeding three months' pay may be allowed from the sum at his credit at the discretion of the sanctioning authority.'

"(2) The following are cited as examples of occasions on which the grant of advances may be considered, provided the circumstances are exceptional —(*a*) to pay expenses incurred in connection with the illness of a subscriber or a member of his family, (*b*) to pay for the passage over the sea of a subscriber or any member of his family, (*c*) to pay expenses in connection with marriages, funerals or ceremonies which by the religion of the subscriber it is incumbent upon him to perform and in connection with which it is obligatory that expenditure should be incurred."

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Hindley v. *Joynaram Marwari* (1), in which the Bombay case was followed and approved. Another Bombay case, *Nagindas Bhukhandas* v. *Ghelabhai Gulabdas* (2), has gone even further and held that the deposit is protected even after payment to the subscriber. It is not necessary to go the length of the last mentioned decision in the present case. Against the authority of two High Courts, the applicant can only cite an earlier single Judge case of the Bombay High Court, which was overruled in the case relied on by the court below. The learned vakil for the applicant has attempted to distinguish the Bombay ruling on the ground that it was optional with the subscriber in the first place whether to join the Provident Fund or not This makes no difference, in view of the definition contained in section 2 (4) of the Act. The question whether a deposit is a compulsory deposit depends on whether it was repayable on demand or at the option of the subscriber. Under the Provident Fund rules which have been placed before me the deposit in this case was not so repayable. It is also urged that in certain cases an advance might be given to the subscriber out of the deposit even before retirement. This also does not affect the question of law involved, for this advance could only be given under the orders of the sanctioning authority for special cause shown and not at the option of the subscriber. The weight of authority is distinctly in favour of the view taken by the court below and I dismiss the application with costs.

Application dismissed

APPELLATE CRIMINAL.

Before Mr Justice Walsh and Mr Justice Ryves

EMPEROR *v.* NANHU AND ANOTHER *

1923

April, 19.

Act No XLV of 1860 (Indian Penal Code), sections 299, 300—Culpable homicide—Murder—Reckless administration of dhatura

A person who recklessly administers *dhatura* to another is guilty, if death ensue, of the offence of murder, and not merely of culpable homicide not amounting to murder or of grievous hurt *Emperor* v *Gulali* (3) and *Jeoti* [illegible] (4), referred to

THE facts of this case sufficiently appear from the judgment of the Court

* Criminal Appeal No 152 of 1923, from an order of Mohammad Abdul Ghani, Additional Sessions Judge of Bareilly, dated the 19th of January, 1923.

(1) (1919) I L R, 46 Calc., 962
(2) (1919) I L R, 44 Bom., 673
(3) (1905) I L R, 31 All, 148
(4) (1913) 15 A L J 18

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EMPEROR v. NANHU.

This was an appeal from jail. The appellants were not represented.

The Government Pleader (Mr. *Sankar Saran*), for the Crown.

WALSH and RAVES, JJ. :—Nanhu and Bhagga were convicted by the learned Additional Sessions Judge of Bareilly under section 304 of the Indian Penal Code with reference to the death of one Tika, and under section 328 of the Indian Penal Code for administering *dhatura* poison in the food served to Gopal and Raghbar. They were sentenced to seven years' rigorous imprisonment under each section, the sentences to run concurrently. They appealed from jail and a learned Judge of this Court directed that notice should issue to the appellants to show cause why they should not be convicted under section 302 of the Indian Penal Code for poisoning Tika and why their sentence should not be enhanced or other suitable order passed. Notice has been served but no appearance has been made. The facts of the case admit of no dispute. On the 26th of May, 1922, these two accused, who are *kurmis* by caste but who represented themselves to be Banias, made friends with three young men Tika, Gopal and Raghbar, who were returning to service, at the Dharamsala adjoining the Bareilly junction. They got into conversation with them; and in the evening they proposed to cook *dal* and *roti* for them and did so. Shortly after partaking of this food all three became more or less insensible. Tika died eventually. Gopal and Raghbar were taken to hospital and they ultimately recovered after treatment. The cause of Tika's death was *dhatura* poisoning. The property which these persons had had been removed by the accused. Subsequently the accused were arrested and property which had belonged to their victims was recovered from their possession. There can be no doubt of these facts. In our opinion the charge should have been framed under section 302 Under section 299 of the Indian Penal Code, which defines the offence of culpable homicide, it is said, "whoever causes death by doing an act with the intention of causing death, or with the intention of causing such bodily injury as is likely to cause death, or with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide." And having regard to the 3rd and 4th paragraphs of section 300, such culpable homicide is murder. Now, there

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EMPEROR v. NANHU

when they administered *dhatura* recklessly in the food they had prepared for these persons, that it was likely to cause death. If authority is wanted for this proposition, see *Emperor* v. *Gutali* (1) and *Jeoli* v. *Emperor* (2). We do not, however, propose to order a fresh trial in this case under section 302 We content ourselves with passing the maximum sentence under section 304, namely transportation for life. If people deliberately and recklessly poison travellers with the intention of robbing them while they are insensible under the effects of the drugs given to them, and take advantage of the facilities provided by the Railway authorities for the comfort of passengers and cause death, they must take the consequences. We therefore enhance the sentence under section 304 of Nanhu and Bhagga to transportation for life with effect from the date of their conviction. We retain the conviction and sentence under section 328 The terms of imprisonment will be concurrent. The appeal is dismissed.

[See also *Queen-Empress* v *Tulsha*, I L R, 20 All., 143 —Ed]

APPELLATE CIVIL.

Before Mr Justice Lindsay and Mr Justice Sulaiman

1923 *April*, 20.

ALAM CHAND (DEFENDANT) *v.* CHHAJJU (PLAINTIFF) *

Pre-emption—Wajib-ul-arz—*Custom or contract*—*Other matters besides pre-emption mentioned in* wajib-ul-arz

If a *wajib-ul-arz* contains matters which could not possibly be the subject of a custom, then the ordinary presumption that the *wajib-ul-arz* is a record of custom is overturned *Seats* if the other matters mentioned in the *wajib-ul-arz might* be the subject of custom, though they have nothing to do with pre-emption. *Fazal Husain* v *Muhammad Sharif* (3) and *Surajbali Singh* v *Mohammad Nasir* (4), referred to

THE facts of this case sufficiently appear from the judgment of the Court.

MR. *Nihal Chand*, for the appellant.

Babu *Satish Chandra Das*, for the respondent

LINDSAY and SULAIMAN, JJ.:—Two points have been discussed before us in this second appeal. The first point is

* Second Appeal No 1490 of 1921, from a decree of H. J Collister, Additional Judge of Meerut, dated the 1st of July, 1921, confirming a decree of Kedar Nath Mehra, Additional Munsif of Kairana, dated the 20th of December, 1920

(1) (1908) I L R, 31 All, 148
(2) (1917) 15 A. L J, 13
(3) (1914) I L R, 36 All, 471
(4) (1918) 16 A. L J, 879

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whether the courts below were right in holding that the *wajib-ul-arz* of 1863 was evidence of a custom.

It is contended before us that, because the *wajib-ul-arz* in question is so framed as to refer to matters other than pre-emption, it ought not to be treated as a record of custom but merely as a record of contract.

It has no doubt been held in a number of cases which have been consistently followed, that if a *wajib-ul-arz* contains matters which could not possibly be the subject of a custom, then the ordinary presumption that the *wajib-ul-arz* is a record of custom is overturned. That rule is laid down in the case of *Fazal Husain* v. *Muhammad Sharif* (1). It was also enunciated in another case, *Sarajbali Singh* v. *Mohammad Nasir* (2). In this latter case, we may observe, the *wajib-ul-arz* upon which reliance was placed, in addition to providing for pre-emption, made provisions for other matters, such as redemption of property transferred by a person who had no interest in the right to redeem. Clearly in cases of this latter description the *wajib-ul-arz* does contain matters which cannot possibly be the subject of custom.

Coming now to the *wajib-ul-arz* with which we are concerned in this case, there can be no doubt that other matters as well as pre-emption are referred to. We find a reference to the manner of inheritance. We find reference to the powers of the widow who is in possession after her husband's death. There are declarations as to how property descends when a deceased co-sharer has left two widows. There are also provisions for the exclusion of daughters and daughters' sons from inheritance. It cannot, however, be said that the matters which we have just referred to *cannot* be the subject of custom, for it is notorious that there is a widespread custom, for example, of the exclusion of daughters and daughters' sons from inheritance; another well-known custom is the custom of *stribant* or the division of property in accordance with the number of wives.

Looking at this *wajib-ul-arz* we are unable to hold that it falls within the purview of the rulings to which we have referred and we consider therefore that the courts below were justified in holding that the *wajib-ul-arz* was a record of custom.

The only other point raised is with regard to certain findings of fact of the courts below.

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The sale in this case purported to be for a sum of Rs. 1,200. It was recited in the sale-deed that a sum of Rs. 550 was being left with the purchaser to redeem a prior mortgage and the balance of Rs. 650 was to be paid before the registering officer. Both the courts below are agreed that the money was handed over to the vendor before the registering officer but they are also agreed that after it had been so made over it was returned again to the purchaser. On the findings, therefore, of the courts below this transfer was made for a sum of Rs. 550 only.

In these circumstances it has been argued by the learned counsel for the appellant that there was no sale at all, inasmuch as the vendor got nothing. We see, however, that the learned Judge of the court below has recorded a finding that the market value of the property sold was not more than Rs. 500. If, therefore, by this transfer the vendor was getting rid of the liability to pay a sum of Rs. 550 it cannot be said that there was no consideration for the transfer. We may observe that the prior mortgage in respect of which Rs. 550 was left with the purchaser was of the year 1917 and that a suit to enforce the personal obligation of the mortgagor was well within time. It seems to us that the argument that this transfer does not amount to a sale cannot succeed.

The result is that we dismiss this appeal with costs.

Appeal dismissed.

Before Mr Justice Lindsay and Mr Justice Sulaiman.

1923

April, 30.

SRI THAKUR RADHIKA RAMAN BIHARIJI MAHARAJ AND ANOTHER (DEFENDANTS) *v.* BOHRA SHIAM SUNDAR LAL AND ANOTHER (PLAINTIFFS) [1]

Pre-emption—Three pending suits for pre-emption of shares in same village against the same defendants—Two suits decreed and one remanded—Subsequent dismissal of the third suit for default—Effect thereof on the first two suits.

Two suits for pre emption of separate transfers of shares in the same village to the same vendee were pending when a third transfer, on the face of it a gift but found to be a sale, of another share was made in favour of the same vendee and became the subject of a third suit for pre-emption. All three suits were disposed of together and were dismissed. On appeal, however, the two earlier suits were decreed and the third was remanded. It was alleged that the third suit was ultimately dismissed for default.

Held that the failure of the third suit could not have retrospective effect and entitle the defendant to the dismissal of the two previous suits. *Bihari Lal v. Mohan Singh* (1), distinguished. *Sukna Bibi v. Amiran* (2), referred to.

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[1] Second Appeal No. 1446 of 1921, from a decree of Harihar Prasad, Subordinate Judge of Mutira, dated the 15th of August, 1921, reversing a decree of Makhan Lal, Munsif of Mahaban, dated the 28th of February, 1921.

(1) (1920) I. L. R., 42 All., 268.
(2) (1888) I. L. R., 10 All., 472.

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SRI THAKUR JUGDISH NARAIN BIHARIJI MAHARAJ v. HOHRA SITLAM SUNDAR LAL.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Girdhari Lal Agarwala*, for the appellants.

The respondents were not represented.

LINDSAY and SULAIMAN, JJ.:—These are appeals by a defendant arising out of two suits for pre-emption.

On the 14th of June, 1919, defendant No. 2 executed a sale-deed in favour of Jamuna Prasad, defendant No. 1, of a certain share in Muhaban. This was followed by another sale-deed, dated the 11th of May, 1920, of another share in the same village. On the 12th of June, 1920, a suit for pre-emption was instituted by the plaintiffs respondents to pre-empt the first sale. After the written statement in that suit had been filed, Jamuna Prasad executed a deed of gift on the 17th of August, 1920, under which he transferred the share sold under the previous two sale-deeds in favour of the idol, defendant appellant. It was after this transfer that a second suit to pre-empt the second sale was filed on the 29th of November, 1920. Subsequently, on the 14th of February, 1921, Muhammad Siddiq-ul-Husain, one of the original vendors, executed a deed which purported to be a deed of gift in favour of the defendant appellant. The day after that, a third suit was instituted to pre-empt this transfer. The court of first instance disposed of all the three suits on the 28th of February, 1921, and dismissed all the three suits. On appeal the first two suits for pre-emption were decreed and the third was remanded. It is suggested before us that the third suit was ultimately dismissed for default.

On behalf of the defendant it is contended that inasmuch as the third suit finally failed for want of prosecution, the dismissal must be given a retrospective effect with the result that the defendant appellant had become a co-sharer by virtue of the transfer of the 14th of February, 1921, and, therefore, the other suits also were liable to be dismissed. We may point out that the learned District Judge in the two cases has come to a distinct finding of fact that the transfer of the 14th of February, 1921, was in reality a sale and not a gift. If it had been a gift then there can be no doubt that on the 14th of February, 1921, the defendant would have acquired a mature title as a co-sharer. On the finding, however, the transfer was only

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SRI THAKUR RADHIKA RAMAN BIHARIJI MAHARAJ v. BOHRA SHAM SUNDAR LAL.

the first court passed its decree, the defendant's right under the deed of transfer dated the 14th of February, 1921, was still being challenged and he had not become a co-sharer in the village. We think, therefore, that there could have been no justification for the court of first instance to dismiss the other two suits on the sole ground that the defendant had become a co-sharer. We may point out that but for this last transfer the defendant appellant was a stranger to the mahal.

The learned vakil for the appellant relied on the case of *Bhari Lal* v *Mohan Singh* (1) In that case, however, the defendant vendee had acquired the property under a deed of gift before the decree of the first court was passed, and which deed of gift obviously could not have been challenged by a suit for pre-emption. That case, therefore, is clearly distinguishable. In the present case we have only got to see what decree the court of first instance should have passed. If the court of first instance wrongly dismissed the claim, the plaintiff cannot be prejudiced by acquisition of title by the defendant, on a subsequent dismissal of the third suit This was the principle accepted in the case of *Sakina Bibi* v. *Amran* (2), with which we agree The result, therefore, is that the claim for pre-emption of the two previous sales cannot be defeated by virtue of the dismissal of the third suit which took place on the 29th of November, 1921, long after the date of decree of the first court.

The appeals are, in our opinion, without force and are hereby dismissed, but without costs as no one appears for the respondents

Appeal dismissed.

Before Mr Justice Ryves and Mr Justice Daniels

1923
April, 23.

MUHAMMAD SIDDIQ ALI KHAN (PLAINTIFF) *v* ANWAR-UL-HASAN AND OTHERS (DEFENDANTS).*

Act (Local) No IV of 1912 (*Court of Wards Act*), *section* 54—*Suit against wards—Notice given by predecessor in title of plaintiff not effective*

Held that a notice given by the immediate predecessor in title of a plaintiff of his intention to sue the Court of Wards for the recovery of property in which certain wards were interested would not enure for the benefit of the plaintiff himself when the property was transferred to him *Bachchu Singh* v *The Secretary of State for India in Council* (3), followed

* Second Appeal No 190 of 1922, from a decree of A Hamilton, Additional Judge of Moradabad, dated the 10th of November, 1921, confirming a decree of Ram Chandra Saksena, Subordinate Judge of Bijnor, dated the 15th of September, 1920

(1) (1920) I L R, 42 All, 268
(2) (1888) I L R, 10 All, 472
(3) (1902) I L R, 25 All, 187

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MUHAMMAD SIDDIQ ALI KHAN v. ANWAR-UL-HASAN.

Maulvi *Iqbal Ahmad*, for the appellant.

Babu *Lalit Mohan Banerji*, for the respondents.

REYES and DANIELS, JJ. :—The facts out of which this appeal arises are as follows :—

Ibrahim Ali Khan owned property, some of which is in suit. He died leaving 3 sons and 3 daughters, one of whom was Musammat Batul-un-nissa who was entitled to 1/9th of the property owned by Ibrahim Ali Khan at his death. She died leaving a son Anwar-ul-Hasan, who became entitled to 2/3rds of the 1/9th share inherited by his mother. He sold his share to Muhib Ali, who sold to Mazhar Husain, who in turn sold to the plaintiff. This is a suit by the plaintiff for declaration and for possession of the property. The defendant No. 1 is Anwar-ul-Hasan, the transferor of the property. Defendants 2 to 9 are the persons who represent the sons and daughters of Ibrahim Ali Khan. Defendants 10 to 25 are subsequent transferees from the sons of these defendants. Nos. 22 to 25 are wards under the Court of Wards. Defendants 22 to 25 alone contested the suit, on the ground that the notice required by section 54 of the Court of Wards Act (Act No. IV of 1912 of the local legislature) had not been duly served. This plea was upheld in both courts and an *ex parte* decree was passed against defendants 1 to 21 and the suit was dismissed as against defendants 22 to 25. The plaintiff brings this appeal on two grounds. Firstly, it is argued that, inasmuch as Mazhar Husain, who sold the property to the plaintiff, had given notice of his intention to bring a suit similar to this one against the Court of Wards, that notice enured for the benefit of the plaintiff.

Secondly, that in any case section 54 of the U. P. Court of Wards Act was not applicable, because the suit did not relate to "the property" of the wards.

With regard to the first plea it is only necessary to say that the ruling in *Bachchu Singh* v. *The Secretary of State for India in Council* (1) is conclusive.

On the second plea it seems to us that, on the allegation in the plaint itself in paragraph 12, the plaintiff admits that the wards have an interest in the property. The ruling on which he relies, namely, *Lal Singh* v. *The Collector of Etah* (2) has no application. There the property did not belong to the ward but to the judgment-debtor of the ward, and the mere fact that

(1) (1902) I. L. R., 25 All., 187.
(2) (1914) I. L. R., 36 All., 331.

the ward had attached that property did not create any right in the property in the ward. The very fact that the plaintiff has appealed from the decree of the first court dismissing the suit as against the wards shows clearly that the plaintiff himself realized that the suit does relate to the property of the wards. In our opinion the appeal fails and is dismissed with costs.

Appeal dismissed.

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MUHAMMAD SIDDIQ ALI KHAN v. ANWAR-UL-HASAN.

Before Mr Justice Piggott and Mr. Justice Walsh

1923

April, 24.

ABDULLAH KHAN (DEFENDANT) *v* MUHAMMAD MAQBUL HUSAIN (PLAINTIFF) AND MUSAMMAT SHAFIQA AND OTHERS (DEFENDANTS) *

Civil Procedure Code, order XLI, rule 23—Remand—Unnecessary remand of whole case by lower appellate court—Procedure

In a suit for recovery of possession of a house and damages against the defendants who were alleged to be trespassers, defendants pleaded adverse possession. The trial court found in their favour and dismissed the suit. On appeal by the plaintiff, the lower appellate court found in favour of the appellant on the question of title as well as of possession, but as there was no finding by the first court on the question of damages, it remanded the whole case to the first court under order XLI, rule 23, of the Code of Civil Procedure. *Held*, that the order was an improper one. The lower appellate court should either have remitted an issue on the question of damages or should have determined the question itself.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Mohan Lal Sandal*, for the appellant.

The respondents were not represented.

PIGGOTT and WALSH, JJ.:—In the suit out of which this appeal arises the plaintiff came into court claiming to be the owner of a residential house, fully described in the plaint, and sued for recovery of possession and damages against certain defendants alleged to be in possession as trespassers. The plaintiff asserted that the defendants were the heirs and representatives of two persons whom he had let into possession of the premises in the month of April, 1917, on a three years' lease. He pleaded that in a subsequent suit, brought to enforce the terms of the alleged covenant of lease, the defendants had denied his title. He, therefore, sued for ejectment of the defendants as trespassers and for a sum of Rs. 46 by way of damages on account of their use and occupation of the house. The defendants put the plaintiff to proof of his title and pleaded further that they and their predecessors had held possession of the house in suit adversely to the plaintiff for a period of 40 years. The trial court fixed two issues: one on the question

* First Appeal No. 17 of 1923, from an order of Man Mohan Sanyal, Subordinate Judge of Moradabad, dated the 23rd of October, 1922.

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of title and one on the question of [illegible], but decided the two issues together in a somewhat confused judgment which we can only interpret as being a finding in favour of the defendants on the question of adverse [illegible] only. The suit having been dismissed on this ground, the plaintiff appealed. The lower appellate court has definitely found in favour of the plaintiff on the question of title and on the question of possession. There having been no finding by the trial court on the [illegible] of damages, the learned Subordinate Judge, instead of going into the question himself or remitting an issue to the trial court, has exercised his powers under order XLI, rule 23, of the Code of Civil Procedure to remand the whole case to the court of first instance. The appeal before us is by one of the defendants. In substance two points are taken. The first of these is that the finding of the lower appellate court on the question of [illegible] is based in part upon inadmissible evidence, namely, upon a certain rent agreement of the 15th of April, 1917, which was inadmissible in evidence by reason of the provisions of section 49 of the Indian Registration Act No. XVI of 1908. We do not find that this objection was taken in the trial court. The document was denounced by the defendants as a forgery and there was much controversy in both the courts below as to whether or not its execution was proved. But there is not a word in the judgment of the trial court as to the admissibility of the document in evidence. We doubt, under the circumstances, whether the learned Subordinate Judge should have allowed the point to be taken: in any case, we are not prepared to dissent from his view, which is that he has not received the document in evidence of any contract of lease, or other transaction affecting the immovable property in suit, but has merely treated it as an item of evidence bearing on the question of the date on which certain persons, the predecessors in title of the defendants, entered into possession of certain premises. The other point urged in appeal is that the lower appellate court has abused its powers of remand under order XLI, rule 23, of the Code of Civil Procedure. We certainly consider that the order in question was an improper one and unfair to the parties, who were clearly entitled to a final decision from the court of first appeal and to be spared the necessity of further proceedings in the trial court and the possibility of another first appeal from any decree which that court might finally pass. It would be obviously

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competent for us to substitute for the order under appeal an order remitting an issue under order XLI, rule 25, of the Code of Civil Procedure; but in view more particularly of the fact that the plaintiff respondent is not represented at the hearing of this appeal, we think the most suitable course for us to adopt is to pass an order disposing of the suit finally at this stage. The lower appellate court might undoubtedly have taken upon itself the determination of the question of the amount of damages, on the evidence available upon the record, without remitting any issue at all, and we have the same power under rule 33 of order XLI of the Code of Civil Procedure. So far as we are able to ascertain from the record, the plaintiff failed to produce admissible evidence on which the court could come to any satisfactory finding as to the amount of damages to which he was entitled If we are right in this view, then the lower appellate court should not, by remanding the whole case, have virtually offered the plaintiff an opportunity of producing further evidence on this point The result is that we substitute for the order under appeal the decree which, in our opinion, the lower appellate court ought to have passed That is, we set aside the order and decree of the first court and in lieu thereof we give the plaintiff a decree for recovery of possession and dismiss his claim for damages. The plaintiff is entitled to 2/3rds of his costs throughout, as against all the defendants. The defendant who has appealed to this Court may recover 1/3rd of his costs in all three courts from the plaintiff

Order set aside..

REVISIONAL CIVIL.

Before Mr Justice Piggott

1923

April, 25.

ADYA SARAN (PLAINTIFF) *v* KALI CHARAN AND ANOTHER (DEFENDANTS).* *Act (Local) No II of* 1901 *(Agra Tenancy Act), section* 177—*Order returning memorandum of appeal—High Court's powers of revision*

Held that the High Court has no jurisdiction to interfere in revision with the order of a District Judge returning a memorandum of appeal for presentation to the proper court upon the ground that the appeal did not be to him under the provisions of section 177 of the Agra Tenancy Act, 1901. *Gaj Kumar Chandar v Salamat Ali* (1). followed *Parbhu Narain Singh v. Harbans Lal* (2), *Jamna Prasad v Karan Singh* (3) and *Keshe Das v. Murat* (4), referred to

* Civil Revision No 137 of 1922

(1) (1910) I L R, 42 All, 83

(2) (1916) 14 A L J, 281.

(3) (1918) I L R, 41 All, 26

(4) (1914) 12 A L J, 367

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ADYA SARAN v. KALI CHARAN.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Uma Shankar Bajpai*, for the applicant.

Munshi *Narain Prasad Asthana*, for the opposite parties.

PIGGOTT, J.—This is an application in revision against an order by which the District Judge of Cawnpore refused to entertain a petition of appeal presented to him against the decree of an Assistant Collector in what was, beyond question, a suit under the Local Tenancy Act No. II of 1901. The suit, as originally brought, was a suit of the description covered by serial No. 36, group C, of the fourth schedule to the said enactment, and under the provisions of sections 150 and 154 of the said Act. It is possibly an arguable point whether the decree, against which the petition of appeal was presented in the court of the District Judge, was in reality a decree in the suit as originally instituted, or whether it could be treated as a decree in a separate suit or proceeding, which had arisen out of the former one and fell under the purview of serial No. 38 of group C of the schedule already mentioned, being governed by the provisions of section 150/158 of the Tenancy Act. In any event, the petition of appeal to the District Judge invited him to take cognizance "in the way of appeal," within the meaning of section 167 of the Local Tenancy Act No. II of 1901, of a matter in respect of which a suit of the nature specified in the fourth schedule of the Act, not only might have been brought, but had actually been brought. The District Judge held that the provisions of section 177 of the aforesaid Tenancy Act No. II of 1901 did not give him jurisdiction to entertain the appeal.

The application before me is in revision against an order returning the petition of appeal, which followed upon the above-mentioned decision.

A preliminary objection is taken that this Court has no jurisdiction to take cognizance of this matter by way of a petition of revision. I stand committed to the view that the cognizance of this Court is barred by section 167 of the Local Tenancy Act already referred to. I gave my reasons for this conclusion in the case of *Parbhu Narain Singh* v. *Harbans Lal* (1). My view was subsequently adopted by another learned Judge of this Court in a decision which has found its way

(1) (1916) 14 A. L. J., 281 at 290—291.

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into the authorized reports, *vide Jamna Prasad* v. *Karan Singh* (1). On the other side, my attention has been drawn to a number of instances in which this Court has assumed jurisdiction to interfere in revision with orders such as the one now before me. Most of these cases are unreported and I do not find any of them in the authorized reports. I am, however, referred to the case of *Kesho Das* v. *Murat* (2). The jurisdiction of this Court to interfere in revision was in this, and in similar cases, taken for granted, but not judicially affirmed upon objection raised. In this state of the authorities, I might have felt disposed to refer the question of jurisdiction to a Bench of two Judges, but I find that this has already been done. The case of *Gaj Kumar Chandar* v. *Salamat Ali* (3) is one in which the question of principle, about which another learned Judge of this Court had dissented from me in *Parbhu Narain's* case (4), was expressly referred to a Bench of two Judges for determination. The learned Judges have in terms adopted the view affirmed by me in *Parbhu Narain's* case (4). I feel bound, therefore, to hold that the question of the entertainability of this application is concluded by authority. I hold that it is not entertainable and on this ground dismiss it with costs.

Application disallowed.

Before Mr. Justice Piggott

1923

April, 25

JUGAL KISHORE, GIRDHARI LAL (APPLICANT) *v.* ACHAL SINGH, TAKHAT SINGH (OPPOSITE PARTY) *

Act No IX of 1887 (Provincial Small Cause Courts Act), section 17 proviso—Suit dismissed for default with order on plaintiff to pay defendant's costs—Dismissal set aside—Deposit of costs not a condition precedent to setting aside dismissal for default

Held that the proviso to section 17 of the Provincial Small Cause Courts Act did not apply to an order made by a Court of Small Causes dismissing a suit for default of appearance and directing the plaintiff to pay a certain sum as costs to the defendant; such an order can be set aside by the court although, at the time of making his application, the plaintiff neither deposited the amount of the costs nor gave security for their payment

THE facts of this case sufficiently appear from the judgment of the Court.

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* Civil Revision No 45 of 1923.

(1) (1913) I L. R., 41 All., 28

(2) (1914) 12 A. L J., 367

(3) (1919) I L. R., 49 All., 88

(4) (1916) 14 A. L J., 281 at 290—291

1923

JUGAL KISHORE, GIRDHARI LAL v. ACHAL SINGH, TAKHAT SINGH.

Babu *Saila Nath Mukerji*, for the applicant.

Munshi *Narain Prasad Ashthana*, for the opposite party.

PIGGOTT, J.:—A suit in the Court of Small Causes at Agra was dismissed for default of appearance by the plaintiff.

Along with the order of dismissal was an order that the plaintiff should pay the defendant's costs, amounting to Rs. 18-8-0. Within limitation the plaintiff applied under order IX, rule 9, of the Code of Civil Procedure for an order to set the dismissal aside. He satisfied the Judge of the Small Cause Court that there was sufficient cause for his non-appearance, and obtained an order setting aside the dismissal. It does not appear that this order was coupled with any direction that the plaintiff should first pay the costs which had been awarded against him, though such an order would undoubtedly have been within the discretion of the court. The result has been that the defendant has come to this Court in revision, contending that the order setting aside the dismissal was without jurisdiction, because the plaintiff had not first deposited the aforesaid sum of Rs. 18-8-0 or given security in respect of the same. This contention is sufficiently answered by the wording of the *proviso* to section 17 of the Provincial Small Cause Courts Act No. IX of 1887. The order dismissing the suit for default was not a decree, *vide* section 2, clause (2) of the Code of Civil Procedure; nor was the application for an order to set the dismissal aside an application for an order to set aside a decree, *vide* order IX, rule 9, of the Code of Civil Procedure; still less was it an application for review of judgment. The *proviso* in question, therefore, does not apply to this case. The words "or in pursuance of the judgment" in the said *proviso* must be read distributively and applied to the words "for a review of judgment" which precede. I am informed that this view has been taken by the Calcutta High Court in an unreported case.* The point seems to me sufficiently clear on the wording of the statute law. I dismiss this application with costs.

Application dismissed.

*[*Yusuf Akram* v. *Arfan Ali* (1915) 23 C. L. J., 147.—Ed.]

APPELLATE CIVIL.

Before Mr Justice Lindsay and Mr Justice Sulaiman.

KUNDAN LAL (PLAINTIFF) v MAKUNDI KUNWAR AND OTHERS (DEFENDANTS) *

1923
April, 26.

Pleadings—Finding on evidence against adoption set up by plaintiff—Partial admission by one defendant—Limited finding in favour of adoption as against the one defendant not possible

When a court finds on the evidence generally against a specific allegation made by the plaintiff, as, for example that he, the plaintiff, was validly adopted by a certain person, it is not open to the court in the same suit to find, on the strength of an apparent admission made by one of the defendants, that, as regards certain property in possession of that defendant, the adoption must be held to be established *Janki Das* v *Ahmad Husain Khan* (1), referred to

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. *Surendra Nath Sen*, Babu *Lalit Mohan Banerji* and Babu *Surendra Nath Gupta*, for the appellant.

Mr. *B E. O'Conor*, Mr. *Nihal Chand*, Mr *J. M. Banerji*, Munshi *Girdhari Lal Agarwala*, Babu *Piari Lal Banerji*, Dr. *Kailas Nath Katju* and Munshi *Janki Prasad*, for the respondents

LINDSAY and SULAIMAN, JJ. :—This is a plaintiff's appeal arising out of a suit for recovery of possession of considerable property, together with mesne profits, against several sets of defendants The plaintiff's case was that one Maheshwar Dayal, son of Sri Kishen Das, was the last male owner of the property and died in the year 1895. On his death he was succeeded by his mother Musammat Gomti Kunwar, who died in 1903; and on her death his grandmother Musammat Darab Kunwar remained in possession till 1906 when she also died. On the death of this second limited owner the plaintiff claimed to succeed as Maheshwar Dayal's nearest collateral, alleging that he was connected with him through Jwala Datt, who was Harsukh Rai's daughter's son and was alleged to be his adopted son also.

The suit was instituted just within 12 years of the death of Musammat Darab Kunwar. In the plaint there was no express mention as to when the alleged adoption of Jwala Datt took place, nor was it stated whether he had been adopted by

* First Appeal No 30 of 1920, from a decree of Lal Gopal Mukerji, Additional Subordinate Judge of Saharanpur, dated the 27th of October, 1919

(1) (1902) I L R , 25 All , 159.

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Harsukh Rai himself or by his widows after his death, and in the latter case, whether the widow had any authority to adopt. The plaintiff contented himself by simply stating that he was the heir of Maheshwar Dayal according to the genealogical table given in the plaint. By subsequent oral pleadings the plaintiff asserted that Jwala Datt had been adopted after the death of Harsukh Rai by his widows with his authority, and that there was a custom among Vaish Agarwals to adopt a daughter's son.

Separate written statements were filed on behalf of various defendants. Musammat Makundi Kunwar and Musammat Lachchi Kunwar, defendants Nos. 1 and 2, pleaded that Nihal Chand and Sri Kishen Das had been joint, that Jwala Datt had never been adopted by Harsukh Rai's widows, nor had the widows any authority to adopt him, nor could an adoption of a daughter's son be valid. They further set up the adoption of Jai Bhagwan Sarup, defendant No. 3, thereby denying that the plaintiff was the nearest collateral. Jai Bhagwan Sarup, defendant No. 3, asserted that Musammat Lachchi Kunwar, the widow of Bisheshwar Dayal, had adopted him and thus he became the nearest heir of Sri Kishen Das or Maheshwar Dayal and would in any case exclude the plaintiff. He also pleaded that the plaintiff was estopped from denying his adoption and urged that the claim was barred by time. Lala Fateh Chand, defendant No. 4, filed a separate written statement in which he admitted generally the pedigree given in the plaint, with the exception of the existence of Maheshwar Dayal. He pleaded, *inter alia*, that no son qualified to inherit was ever born to Sri Kishen Das, and set up a will of Sri Kishen Das in favour of Musammat Gomti Kunwar and a subsequent will of Musammat Gomti Kunwar in his own favour. By a subsequent oral pleading he denied the validity of the adoption and the existence of the alleged custom. Defendants Nos. 5—7 in addition set up their claim as *bonâ fide* purchasers for value from ostensible owners.

Twenty-eight issues were framed in the court below, out of which all the issues, except issues Nos. 3, 4, 8, 26 and 27, have been found in favour of the plaintiff. The grounds on which the plaintiff's claim has been dismissed are that the factum of the adoption of Jwala Datt has not been established, nor has it been proved that Harsukh Rai's widows had the authority to adopt. The plaintiff's contention that an award of the year

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1873 either operated as *res judicata* or concluded the matter as a family arrangement has been overruled.

The learned advocate for the plaintiff has challenged the findings of the learned Subordinate Judge on the issues decided against his client.

We propose to deal with the main question of fact, namely, that of the alleged adoption first and shall deal with the other subsequent questions later on.

[After discussing the evidence, the judgment continued :—]

Having considered the entire evidence, both oral and documentary, we are of opinion that the balance of evidence is distinctly in favour of the defendants and we think that the learned Subordinate Judge has come to the right conclusion in holding that the plaintiff has failed to establish that Jwala Datt had been adopted by the widows of Harsukh Rai.

In view of this finding it becomes unnecessary for us to go into the question of the authority to adopt or any other of the questions raised in the court below

There, however, remains for us to consider the argument of the learned advocate for the plaintiff that in view of the admissions contained in Lala Fateh Chand's pleadings the plaintiff is entitled to a decree against him in respect of the properties in his possession. We have already pointed out that the plaint itself was very defective inasmuch as it did not make any express allegation that Jwala Datt had been adopted by the widows of Harsukh Rai or that his widows had any authority to adopt. The fact of adoption was mentioned only in the genealogical tree given in the plaint. The defendant Lala Fatch Chand generally admitted the correctness of the pedigree, with one exception. When the time for the oral pleadings came, the plaintiff's vakil stated that Jwala Datt had been adopted by the widows of Harsukh Rai after his death and that there was a custom among Vaish Agarwals under which the adoption of a daughter's son was valid. Lala Fateh Chand's vakil, although admitting the factum of adoption, denied the validity of it, basing its invalidity on the Hindu law. The other defendants to the suit had expressly denied the adoption of Jwala Datt. The plaintiff took upon himself the burden of proving the alleged adoption and led evidence to that effect without any reservation. After both parties had

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the plaintiff had failed to prove the case set up by him, it would not be in the mouth of the plaintiff to turn round and ask for a decree against one of the defendants who had not expressly denied one of the facts in issue, though he had denied the validity of the adoption and the maintainability of the claim of the plaintiff altogether. If such a request were allowed, the result would be that in the same suit the court would have to record one finding in favour of the plaintiff based on the admission of one of the defendants to the suit, and another finding on the same issue against him based on the evidence. In an analogous case, namely that of *Janki Das* v. *Ahmad Husain Khan* (1), this Court remarked that it would be illogical to hold in one and the same decree that the full amount of consideration in a mortgage was paid as far as the mortgagee was concerned and that another sum was paid as far as the subsequent transferee was concerned, and that the proper thing to do would be to allow all the defendants to take advantage of the plaintiff's failure to establish the case set up by him. In addition to this we would like to point out that order VIII, rule 5, of the Code of Civil Procedure, which regards allegations of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted, as taken to be admitted, gives a discretion to the court to require any facts so admitted to be proved otherwise than by such admission. We think that in the present case, in view of the ambiguous assertion made in the plaint and the unsatisfactory way in which the pedigree was admitted and the validity of adoption denied by one of the defendants, the court below was justified in calling upon the plaintiff to prove his case. The plaintiff having undertaken to prove it and having failed to do so cannot now fall back upon the partial admission of one of the defendants and ask for a separate decree against him. We are of opinion that when the plaintiff has failed to prove the alleged adoption of Jwala Datt, without proving which he cannot possibly succeed, his whole suit must fail against all the defendants. The plaintiff has in no way been prejudiced and no question of estoppel can arise under the circumstances.

In our opinion the appeal is without force and is hereby dismissed with costs.

We direct that the respondents will be entitled to one set of costs for counsel's fee as against the plaintiff appellant,

(1) (1903) I. L. R., 25 All., 169.

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in addition to the printing and other charges legally taxable. Counsel's fee is allowed to be divided equally between respondents Nos. 1 and 2 (first set), respondent No 3, Jai Bhagwan (second set) and respondent No 4, Lala Fateh Chand (third set)

Lala Fateh Chand has filed a set of cross-objections challenging some of the findings of the learned Subordinate Judge as well as urging that the amount of costs awarded to him should be increased by a sum of Rs 216-10-8 As the decree was in his favour it was unnecessary for Lala Fateh Chand to file any separate objection. As to the question of costs, we are of opinion that in view of the unsatisfactory defence set up by him we should make no modification. The result is that the cross-objections are dismissed with costs

Appeal dismissed.

REVISIONAL CIVIL.

Before Mr Justice Gokul Prasad

1923

April, 27.

EAST INDIAN RAILWAY (DEFENDANT) v MAKHAN LAL, BINDESHRI PRASAD (PLAINTIFF) *

Railway—Suit for damages for non-delivery—Burden of proof—Risk-note form B—Liability of railway company

The plaintiffs sued expressly for "damages for non-delivery" of part of a consignment booked by them with the defendant Railway Company under a risk-note in form B *Held* the defendants were not entitled to claim the benefit of the risk-note unless they were prepared to show that the missing part of the consignment was lost, and was lost in circumstances which were covered by the risk-note. *Secretary of State for India in Council* v *Jiwan* (1) and *East Indian Railway* v *Kishan Lal, Turkha Mal* (2), referred to

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Ladli Prasad Zutshi*, for the applicant

Munshi *Damodar Das* and Pandit *Sri Krishna Mehra*, for the opposite party

GOKUL PRASAD, J.:—This is an application in revision, arising out of a suit for damages for non-delivery of part of a consignment made over to the Railway at Howrah for transport to Allahabad Three casks of cocoanut oil were alleged to have been sent Out of these only two were delivered at Allahabad and one cask was not delivered Hence the present suit.

* Civil Revision No 34 of 1923

(1) (1923) I L. R., 45 All., 260

(2) (1922) I L R, 45 All., 530.

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The defence pleaded by the Railway Company was that section 77 of the Railways Act, IX of 1890, and the risk-note, which was in form B, barred the suit.

In two cases of this Court it has been held that in case of short delivery like this the Railway are not entitled to set up the risk-note unless it was shown that the loss of the cask was due to a theft from a running train or some such cause. This case was tried in the Small Cause Court, and the view taken by the learned Judge of the court below was that the plaintiffs had distinctly stated that their case was one of non-delivery. The defendant Railway Company did not, in the present case, even attempt to prove that the goods had been lost as aforesaid, and it is only after they had done so that the plaintiffs could be asked to prove that the loss was due to any fault of the Railway Company which would make them liable. The learned Judge has referred to several cases. This view, however, was taken in the case of *The Secretary of State for India in Council* v. *Jiwan* (1), and in the unreported case in Civil Revision No. 23 of 1923, decided so recently as the 13th of April, 1923, by MR. JUSTICE DANIELS (2). I am in full accord with these two decisions. It is not necessary to go into the cases decided by other courts. I dismiss this application in revision with costs.

Application dismissed.

APPELLATE CIVIL.

1923
April, 30

Before Mr. Justice Lindsay and Mr. Justice Sulaiman.

SAHIB SINGH AND OTHERS (PLAINTIFFS) v. GIRDHARI LAL AND OTHERS (DEFENDANTS).*

Hindu law—Joint Hindu family—Private sale of joint family property by father—Grounds upon which sale may be questioned by sons.

It is only when the property has passed out of the family on account of an antecedent debt or which it has been sold by public auction, that the sons cannot challenge the alienation unless they show that the debt was tainted with immorality. It is not correct to say that in every case where the property has passed out of the family, (though under a private sale not in lieu of any antecedent debt and even when the legal necessity has not been established), the sons cannot challenge it unless they show that the debts were contracted for immoral purposes. Where a property has been sold by the father, and the sons bring a suit to recover it, and apparently the property has not been sold away at public auction, then it lies upon the transferee to justify the alienation of the estate by showing that the debt was in lieu of some antecedent debt or that the alienation was for some legal necessity

* First Appeal No. 82 of 1921, from a decree of P. K. Roy, Subordinate Judge of Meerut, dated the 9th of December, 1920.

(1) (1923) I. L. R., 45 All., 380.

(2) (1923) I. L. R. 45 All. 390.

Suraj Bunsi Koer v. *Sheo Persad Singh* (1), *Nanomi Babuasin* v *Modhun Mohun* (2), *Bhagbut Pershad Singh* v. *Girja Koer* (3), *Sahu Ram Chandra* v *Bhup Singh* (4) and *Chandradeo Singh* v. *Mata Prasad* (5), referred to.

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SAHIB SI v. GIRDHA LAL

THE facts of this case are fully stated in the judgment of the Court.

Mr. *Nihal Chand* and Babu *Harendra Krishna Mukerji*, for the appellants

Dr. *Kailas Nath Katju* and Munshi *Kailas Chandra Mital*, for the respondents.

LINDSAY and SULAIMAN, JJ :—This is a plaintiffs' appeal arising out of a suit for recovery of possession of a shop by avoidance of a sale-deed, dated the 9th of August, 1918, executed by the plaintiffs' father Girdhari Lal The plaintiffs' case was that the property was ancestral and that the sale-deed was without any consideration and further that there was no legal necessity for it and that Girdhari Lal was a man of immoral character and habits and the debt, if any, had been tainted with immorality. On behalf of the defendants the allegations contained in the plaint were denied and it was urged that the sale was justified. The learned Subordinate Judge has rejected the evidence of the plaintiffs that Girdhari Lal was a man of immoral character and he has further held that there is no evidence whatsoever to connect the alleged immorality with the amount advanced under the deed. He has further held that the defendants vendees have shown that in fact part of the sum was paid in lieu of an antecedent debt and that there was legal necessity for the balance.

The plaintiffs have come up in appeal to this Court and challenge the findings of the learned Subordinate Judge.

The learned Subordinate Judge was of opinion that it was the duty of the sons to show why they were not bound by their father's acts For this view he relies on a passage in Dr. Gour's Hindu Code at p 590 to the effect that the question of the burden of proof must depend upon whether the property has or has not passed out of the family by an alienation made by the father If it has, then the son suing to dispossess the alienee must show why he is not bound by the father's alienation.

(1) (1879) I. L. R., 5 Calc., 148.
(2) (1885) I. L. R., 13 Calc., 21.
(3) (1888) I. L. R., 15 Calc., 717.
(4) (1917) I. L. R., 39 All., 437
(5) (1909) I. L. R., 31 All., 176.

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Reliance is placed on the authority of the earlier Privy Council cases, namely, *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1), *Nanomi Babuasin* v. *Modhun Mohun* (2) and *Bhagbut Pershad Singh* v. *Girja Koer* (3). In all those cases the property had passed out of the family under an execution sale and it was after the execution sale that the sons wanted to challenge the alienation. As was pointed out in the first of these cases, it is only "Where joint ancestral property has passed out of a joint family either under a conveyance executed by a father in consideration of an antecedent debt or in order to raise money to pay off an antecedent debt, or under a sale in execution of a decree for the father's debt, (that) his sons, by reason of their duty to pay their father's debts, cannot recover that property unless they show that the debts were contracted for immoral purposes, and that the purchasers had notice that they were so contracted; and, secondly, that the purchasers at an execution sale, being strangers to the suit, if they have no notice that the debts were so contracted, are not bound to make inquiry beyond what appears on the face of the proceedings". There was no departure in the last two cases from the rules of law laid down in the first case. In the recent case of *Sahu Ram Chandra* v. *Bhup Singh* (4), their Lordships adhered to the interpretation put by Sir JOHN STANLEY in *Chandradeo Singh* v. *Mata Prasad* (5), on the pronouncement in the case of *Suraj Bunsi Koer* v. *Sheo Persad Singh* (1) and remarked that a correct and useful statement of the law was that the rule was applicable only where joint ancestral property has passed out of a joint family, either under a conveyance executed by a father in consideration of an antecedent debt or in order to raise money to pay off an antecedent debt or under a sale in execution of a decree for the father's debt.

It is quite clear, therefore, that it is only when the property has passed out of the family on account of an antecedent debt or where it has been sold by public auction, that the sons cannot challenge the alienation unless they show that the debt was tainted with immorality. It is not correct to say that in every case where the property has passed out of the family (though under a private sale not in lieu of any antecedent debt

(1) (1879) I. L. R., 5 Calc., 148.
(2) (1885) I. L. R., 13 Calc., 21.
(3) (1888) I. L. R., 15 Calc., 717.
(4) (1917) I. L. R., 39 All., 437.
(5) (1909) I. L. R., 31 All., 176.

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and even when the legal necessity has not been established), the sons cannot challenge it unless they show that the debts were contracted for immoral purposes. Where a property has been sold by the father, and the sons bring a suit to recover it, and apparently the property has not been sold away at public auction, then it lies upon the transferee to justify the alienation of the estate by showing that the debt was in lieu of some antecedent debt or that the alienation was for some legal necessity

In the present case the document in question was in lieu of Rs 7,500 It consisted of two items, namely, Rs. 1,237-8-0 due on a promissory note for Rs 1,000, said to have been executed on the 2nd of January, 1917, and the balance of Rs 6,262-8-0 paid in cash before the Sub-Registrar.

As to the first item we think there can be no doubt that it had been paid prior to the execution of the sale-deed. We have the statement of Ram Saran Das vendee, supported by an entry in the account books that the sum of Rs 1,000 had been borrowed on the 2nd of January, 1917, by Girdhari Lal from him The amount of the principal and interest due on it would come up to Rs 1,237-8-0. Girdhari Lal has not gone into the witness-box to deny the passing of this part of the consideration, and in fact there is no evidence to contradict the vendee. We are, therefore, of opinion that his sum was due. This, being a debt due personally from the father and being antecedent in time to the transaction in question and not having been secured on the property, was clearly an antecedent debt and was binding on the family

As to the balance, the defendants' case is that Girdhari Lal was very much indebted and that there were numerous debts outstanding against him in the bazar. Before the execution of the sale-deed the vendee was assured by Girdhari Lal that he owed a number of these debts and was in urgent necessity to pay them. Ram Saran's version is that he actually made inquiries in the bazar and learnt from a number of people that sums of money were due to them from Girdhari Lal; that after this inquiry he agreed to advance the money to Girdhari Lal In support of this Ram Saran Das has gone into the witness-box and he has produced some of these creditors. Mohan Lal witness has stated that Rs 1,000 had been advanced by him to Girdhari Lal under a promissory note and that there are entries in his account books Piari

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Lal, another witness, has sworn that a sum of Rs. 1,150 was paid to him on account of the debt due to him. Ram Richpal Singh has stated that Rs. 880 were realized by him on the 9th of August, 1918, from Girdhari Lal and that there are entries in his account books to prove it. Another Ram Richpal Singh had proved that a sum of Rs. 662 was paid to him on the 28th of October, 1918, as part of the amount due on a promissory note for Rs. 600, dated the 11th of February, 1916. We have also a statement of one Mohan Lal that on the 5th of November, 1918, he was paid Rs. 3,583 by Girdhari Lal. The total of these sums comes to Rs. 6,225. There is also evidence to the effect that there were other debts due from Girdhari Lal at the time the sale-deed was executed. The learned Subordinate Judge has believed the evidence of those witnesses, except that of Piari Lal. The reason given by him for disbelieving this last mentioned witness is that he has not produced any *Bahi khata* or documentary evidence in support of the alleged loan, and that it is possible that he has come to support the defendant as he is a friend of his. Piari Lal apparently is a respectable witness. He pays Rs. 500 or 600 Government revenue and about Rs. 300 income-tax. He had stated that the money advanced had belonged to his wife, and it was on that account that it was not entered in his *Bahi khata*. We must say that we see no reason to disbelieve his statement. Piari Lal stated that he returned the document as soon as it was paid off, which of course might have been done. In our opinion, therefore, the defendant vendee had, before taking the sale-deed, made reasonable and sufficient inquiries to satisfy himself that antecedent debts were existing and that Girdhari Lal had necessity to transfer the property in order to pay off those debts. It was not absolutely necessary for Ram Saran Das to prove how the money advanced by him was actually applied, but in this particular case, we are of opinion, that he has also proved that the greater part of this money was certainly applied for the purposes mentioned.

To disprove the existence of any legal necessity the plaintiffs led evidence to show that Girdhari Lal was a man of immoral character, that he had had two mistresses one after the other and was addicted to drinking and gambling. Four witnesses named Ashfaq Ali, Puran Devi, Ram Prasad and Shiam Sundar have been examined. Their evidence, however,

is only of a general character and has been wholly rejected by the learned Subordinate Judge. We see no reason to differ from his view. Furthermore, the evidence of these witnesses does not in any way connect any of the items, proved by the defendant vendee to have been due from Girdhari Lal, with his immorality or gambling We are, therefore, of opinion that it is not open to the plaintiffs to challenge this alienation without proving that these debts are tainted with immorality or illegality. This they have failed to do. The result is that this appeal fails and is hereby dismissed with costs.

Appeal dismissed.

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Before Mr Justice Ryves and Mr Justice Daniels.

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May, 1

BISHAMBHAR NATH (PLAINTIFF) *v.* MUHAMMAD UBAIDULLAH KHAN AND OTHERS (DEFENDANTS) *

*Construction of document—Mortgage by conditional sale or sale with an option of re-purchase—Circumstances to be considered in determining the true nature of the document—*Res judicata*—Suit for possession of property purchased—"Bai moadhrut."*

In deciding whether a given transaction is an out and out sale with a condition for re-purchase or a mortgage by conditional sale, it is the intention of the parties at the time of entering into the transaction which must be regarded *Bhagwan Sahai* v. *Bhagwan Din* (1) and *Jhanda Singh* v. *Wahid-ud-din* (2), referred to

That intention must be gathered from the terms of the deed itself and the surrounding circumstances Oral evidence is excluded by section 92 of the Indian Evidence Act, 1872. *Balkishen Das* v. *Legge* (3), referred to.

Where a deed is attacked after a long period of years, the burden of proving that it is not what it purports to be, lies heavily on the person attacking it *Alderson* v. *White* (4), referred to

A document, which was on the face of it a sale deed, contained a condition that if the purchase-money and any arrears of rent which happened to remain due at the time of repayment were repaid to the vendee on the last day of *Jeth*, sixteen years after the purchase, the vendors would be entitled to get back the property. It was clearly stipulated that unless payment was made on this particular date, no right of re-purchase was reserved to the vendors. It was further provided that if the purchaser had been put to loss by having to pay any undisclosed incumbrance on the property or in any similar way, he should be indemnified for this at the time of re-purchase.

Held, that the transaction was a sale with a condition of re-purchase and not a mortgage by conditional sale.

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* Second Appeal No. 272 of 1922, from a decree of I. B. Mundle, District Judge of Shahjahanpur, dated the 4th of February, 1922, reversing a decree of Hari Har Lal Bhargava, Subordinate Judge of Shahjahanpur, dated the 20th of July, 1920

(1) (1890) I. L. R., 12 All., 387: L. R., 17 I. A., 98

(2) (1916) I. L. R., 38 All., 570.

(3) (1899) I. L. R., 22 All., 149

(4) (1858) 2 De G. and J., 97 (105).

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The following cases were also referred to:—*Maharaja Mun Singh v. Maharaja Sheo Dihal* (1), *Maharaja Madho v. Vakil Singh Mahtabar* (2), *Muhammad Kazim Ali Khan v. Fakir Chand Ch. Bapu v. Bhikaru* (4), *Wajid Ali Khan v. Shafakat Husain Ch. and Ch. Umed N. Rahmat ullah* (6).

THE facts of this case are fully set forth in the judgment of the Court.

Dr. *Surendra Nath Sen* and Munshi *Narain Prasad Asthana*, for the appellants.

Mr. *B. E. O'Conor*, Sir *Tej Bahadur Sapru*, Mr. *P. N. Sapru* and Maulvi *Iqbal Ahmad*, for the respondent.

RYVES and DAY, JJ.:—The question for decision in this appeal is whether a deed, dated the 25th of June, 1886, executed by Durga Prasad and others in favour of one Qudratullah Khan was an out and out sale or a mortgage by conditional sale. There is a subsidiary question as to whether this issue is *res judicata* between the parties by reason of the decision in suit No. 124 of 1886. The document was on the face of it a sale-deed with a condition that if the purchase-money and any arrears of rent which happened to remain due at the time of repayment were repaid to the vendee on the last day of *Jeth*, sixteen years after the purchase, the vendors would be entitled to get back the property. It was clearly stipulated that unless payment was made on this particular date, no right of re-purchase was reserved to the vendors.

The question has been argued on the footing that the test of whether the document was a sale or a mortgage was the intention of the parties at the time of entering into the transaction. This rule was originally laid down by the Privy Council in *Bhagwan Sahai* v. *Bhagwan Din* (7) and was re-affirmed by their Lordships in *Jhanda Singh* v. *Wahid-ul-din* (8).

Dr. *Sen*, in one portion of his very able argument on behalf of the appellant, took the position that any deed which professes to be a sale-deed with a condition allowing the vendor to re-purchase came within the definition of a mortgage by conditional sale contained in section 58 (c) of the Transfer of Property Act, and must be presumed to be such unless the surrounding circumstances were such as absolutely to exclude the possibility of a mortgage having been intended. This idea

(1) (1922) I. L. R., 45 All., 72.
(2) (1919) I. L. R., 42 Mad., 407.
(3) (1920) I. L. R., 42 All., 437.
(4) (1896) I. L. R., 22 Bom., 245.
(5) (1910) I. L. R., 33 All., 122.
(6) (1892) I. L. R., 14 All., 195.
(7) (1890) I. L. R., 12 All., 587; L. R., 17 I. A., 98.

is supposed to derive some support from the decision in *Mohmdra Man Singh* v. *Maharaj Singh* (1). A reference to section 58(c) is sufficient to show that this is a misreading of the law. A mortgage by conditional sale is therein defined as a mortgage in which the mortgagor "ostensibly sells the property on condition that on default of payment of the mortgage-money on a certain date, the sale shall become absolute, or on condition that on such payment (*i.e.*, payment of the mortgage-money) being made, the sale shall become void, or on condition that on such payment (again *i.e.*, back to the payment of the mortgage money) being made, the buyer shall transfer the property to the seller."

The repetition of the terms "payment of the mortgage money," or "such payment," in each clause of the definition makes it clear that before a document can be a mortgage by conditional sale it must first be a mortgage, *i.e.*, the property must be transferred as security for a debt. The definition of a mortgage is given in clause (*a*) of the section, and the subsequent clauses are merely particular cases of the definition. The neglect of this obvious fact has, in some cases, led to serious confusion. The view suggested by Dr. *Sen* was rejected by a Full Bench of the Madras High Court in *Muthuv* v. *Mudalvar* v. *Vythilinga Mudaliar* (2).

In determining the intention of the parties as to the deed, two principles have been laid down for the guidance of the courts. The first is that the intention of the parties must be gathered from the terms of the deed itself and the surrounding circumstances. Oral evidence is excluded by section 92 of the Evidence Act. This was laid down by the Privy Council in *Balkishen Das* v. *Legge* (3). The second is that where a deed is attacked after a long period of years, the burden of proving that it is not what it purports to be lies heavily on the person attacking it. This rule was originally laid down by Lord Cranworth in the case of *Alderson* v. *White* (4) and has been followed and approved by the Privy Council, both in *Bhagwan Sahai* v. *Bhagwan Din* (5) and in *Jhanda Singh* v. *Wahid-ud-din* (6). In the first of these two cases the document in suit was 30 years old. In the present

(1) (1922) I. L. R., 45 All., 79.
(2) (1919) I. L. R., 42 Mad., 90.
(3) (1899) I. L. R., 22 All., 149.
(4) (1858) 2 De G. and J., 97 (105).
(5) (1889) I. L. R., 12 All., 587.
(6) (1916) I. L. R., 38 All., 570.

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case it was 32 years old at the time of the institution of the suit, and sixteen years had elapsed from the date fixed for re-purchase before it was sought to in any way treat the document as a mortgage and not as a sale. The present plaintiff is a speculator who has purchased a half share in the property from the original vendors or vendees in return for financing the litigation.

Now here the document is very clearly expressed to be a sale. The language is not of that technical and obscure kind referred to in the concluding portion of the judgment in *Muhammad Hamid-ud-din* v. *Fakir Chand* (1). The language used is clear beyond all possibility of misconception and the words "sale," "purchaser," "purchase-money," and "property sold," are repeated again and again in the course of the deed.

What, then, are the circumstances relied on to prove that the transaction was not what it appears to be? Three such circumstances have been mentioned:

1. That at the time of re-purchase the vendors were to pay in addition to the purchase-money any arrears of rent that might at that time be outstanding against the tenants.

2. That one of the parties to the transaction was a Muhammadan.

3. That if the purchaser had been put to loss by having to pay any undisclosed incumbrance on the property or in any similar way he should be indemnified for this at the time of re-purchase.

The fourth argument, that the document must necessarily, or at any rate until the contrary is shown, be treated as a mortgage by reason of the definition contained in section 58(*c*) of the Transfer of Property Act, has already been dealt with.

Neither of the three points relied on by the appellant is at all decisive. As regards the first, if the document was a mortgage and the rents represented the interest payable on the loan, no doubt this condition would find a place in it. It was, however, equally natural, if the transaction was one of re-purchase as it purports to be, that if the re-purchase was made at a time when the rents for the half year were largely outstanding, the original purchaser, who was parting with the property, should receive those rents before doing so. The same argument applies to the condition of repayment of loss to which the first purchaser had been put by reason of there being a prior in-

(1) (1920) I. L. R., 42 All., 437.

cumbrance or in any other similar way. The purchaser was making a concession in allowing the vendor an opportunity of buying the property back and was entitled to see that he got full value.

One of the parties being a Muhammadan may, in a doubtful case, lend some additional probability in favour of a document being construed as a mortgage, but it does not in any way do away with the rule laid down by the Privy Council that a document is to be construed in accordance with the intention of the parties as evidenced by its terms. It may be remarked here that if the intention of the parties had been to effect a mortgage and the document had been drawn up in this particular form solely out of regard to the susceptibilities of the mortgagee, one might have expected more regard to be paid to the interests of the alleged mortgagors. There was, for instance, no reason why the right of re-purchase should be limited, as is the case here, to one single date at the expiration of sixteen years from the date of the mortgage.

One further observation calls to be made at this point. So far as the nature of the contract is to be gathered from the language used, this is a question of construction, which is a question of law. So far, however, as it is to be gathered from external facts proved in evidence it is a question of fact, and the judgment of the court below is that the intention of the parties was to effect an out and out sale and not a mortgage. If the test is, as has been laid down in *Bapu* v. *Bhavani* (1) and other cases, whether a debt remained outstanding which was to be repaid on redemption of the property, there is nothing in the circumstances relied on by the appellant to establish the existence of such a debt. In most of the cases which have been cited on behalf of the appellant such circumstances were apparent. In the recent case of *Mohindra Man Singh* v. *Maharaj Singh* (2), the word "mortgage money" was used in the deed and was indeed deliberately substituted for the term "sale price," and this, the learned Judges pointed out, brought the case exactly within the definition in section 58 (*c*) of the Transfer of Property Act. In the Privy Council case of *Balkishen* v. *Legge* (3), it was found that a debt on account of certain factories was consolidated with the principal sum mentioned in the deed and the bankers were given a security

(1) (1896) I. L. R., 22 Bom., 215
(2) (1922) I. L. R., 45 All., 72
(3) (1899) I. L. R., 22 All., 149

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of the property for this amount. Thus, as their Lordships of the Privy Council themselves pointed out in *Jhanda Singh* v. *Wahid-ud-din* (1), was probably the determining factor in the case. In *Muhammad Hamid-ud-din* v. *Fakir Chand* (2) there was a distinct covenant for the payment of interest at 10 annas per month at the time of re-sale, and this in itself was quite sufficient to confer on the transaction the character of a mortgage. In the case of *Wajid Ali* v. *Shafakat Husain* (3), the vendor was to get back the property at any time after the expiry of six years when the consideration money was tendered by him. The strongest case on behalf of the appellant is the decision in *Ali Ahmad* v. *Rahmat-ullah* (4). In that case, however, the learned Judges who decided it strongly hinted that the case of *Bhagwan Sahai* v. *Bhagwan Din* (5) had been wrongly decided by the Privy Council owing to certain important considerations not having been placed before them. It is quite clear from the decision in *Jhanda Singh* v. *Wahid-ud-din* (1) that the Privy Council have not adopted this view. On the contrary, in the later case, the remarks in *Bhagwan Din's* case are repeated and re-affirmed.

An argument has been based by the learned counsel for the appellant on the fact that the date of payment was the date of the full moon in the month of *Jeth*, which is the date on which usufructuary mortgages are usually made payable. The reason for this date being chosen is the same in both cases, namely, that it is the time of the year in which there is no crop on the land and at which a transfer of possession can be made with the least possible disturbance to the outgoing possessor. It may also be noted that in the case of a usufructuary mortgage, the mortgage money is usually made payable on the full moon of *Jeth* in any year, whereas in this case it is limited to one particular year, and there is a special covenant that unless payment is made on this date the right of re-purchase shall be lost. It has not been suggested that the price paid under the deed was in any way inadequate to the value of the property at the time when the sale was effected. On the contrary, according to the pleadings, it represents sixteen years' purchase on the income of the property. It is common

(1) (1916) I. L. R., 38 All., 670.
(2) (1920) I. L. R., 42 All., 637.
(3) (1910) I. L. R., 33 All., 122.
(4) (1892) I. L. R., 14 All., 195.
(5) (1890) I. L. R., 12 All., 387.

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ground that the property has since increased very greatly in value, and the appeal to this Court was valued at over Rs. 11,000.

For all these reasons our conclusion is that the document is very clearly expressed to be a sale and that there is nothing either in its terms or in the surrounding circumstances to show that it was really a mortgage.

It remains to refer briefly to the question of *res judicata*. It is in evidence that when the document was originally executed the vendors refused to get it registered and it was compulsorily registered at the instance of the purchaser. The vendors also failed to deliver possession to the purchaser and he was compelled to bring a suit (suit No 124 of 1886). Copies of the pleadings and judgment in that case are on the record The plaintiff based his claim very clearly on his proprietary title as purchaser under the sale-deed. The defendants, in their written statement, did not contest the nature of the deed as drawn They pleaded, however, that the contract between the parties had been one of usufructuary mortgage, and alleged that the plaintiff had fraudulently altered its terms and got a deed drawn up which did not represent the real contract between the parties. On these pleadings the case went to trial Two issues were framed. The first was as to whether one particular defendant, Musammat Jit Kunwar, had joined in executing the deed. The second was whether the other defendants agreed to a transaction of "*bai mashrut*" or to one of mortgage with possession. The judgment is in Urdu. The words "*bai mashrut*" used in the issue and in the finding literally mean "a conditioned sale." They may refer, as the appellant wishes us to interpret them, to a mortgage by conditional sale. They may also refer to a sale with a condition of re-purchase. It appears to us that they must be interpreted with reference to the pleadings on which the parties went to trial, and on those pleadings there can be no doubt that the contest between the parties was whether the document was, as alleged by the plaintiff, a sale-deed with a condition of re-purchase, or whether the true contract between the parties was, as alleged by the defendants, one of possessory mortgage. The finding on this issue was in favour of the plaintiff. It seems to us doubtful, however, whether this finding can operate as *res judicata* in the present suit, because the plaintiff was entitled to recover possession of the property

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on the basis of his sale-deed, on the case of fraud set up by the defendants being rejected, whether the document was an out and out sale or a mortgage by conditional sale. At the same time the pleadings in the case serve to show how the document was understood by the parties at the time. Neither party asserted that the deed actually prepared was a mortgage. The plaintiff stood on it as a sale. The defendants asserted that when a mortgage had been agreed upon, the plaintiff had fraudulently caused a sale-deed to be prepared.

For the reasons already given we dismiss this appeal with costs

Appeal dismissed.

REVISIONAL CRIMINAL.

1923

May, 2.

Before Mr. Justice Walsh.

EMPEROR v. C. J. CADE*

Act No. XLV of 1860 (Indian Penal Code), section 420—Criminal breach of trust—Hirer of an article under a "hire-purchase" agreement selling the thing hired before the instalments agreed upon had been paid.

One C agreed to purchase a motor lorry from the owners, paying the price by instalments. Meanwhile he signed an agreement with the owners by which, describing himself as "the hirer," he undertook, *inter alia*, to pay certain instalments to insure the vehicle hired; not to deal with it; to allow the owners to recover possession in case of default in payment of instalments; and he admitted that the lorry would remain the property of the owners until all the instalments due were paid.

Held that C, having, in despite of his undertaking, sold the lorry before the instalments were paid, was guilty of criminal breach of trust within the meaning of section 420 of the Indian Penal Code.

THIS was an application in revision against an order of the Sessions Judge of Allahabad confirming the applicant's conviction under section 420 of the Indian Penal Code.

The facts of the case are fully stated in the judgement of the Court.

Babu *Indu Bhushan Banerji*, for the applicant

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

WALSH, J.: This is an application in revision to review an order of the Sessions Judge of Allahabad confirming a conviction by the Magistrate for breach of trust. The charge is one which is only too familiar to lawyers, namely, a charge against the hirer of an article under a hire-purchase agreement.

* Criminal Revision No. 182 of 1923, from an order of R. D. Yorke, Sessions Judge of Allahabad, dated the 14th of March, 1923

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for having sold it as his own before he had paid up all the instalments. The case is a perfectly clear one and there is really very little to be said about the very clear and interesting judgment of the Sessions Judge. On one point, with regard to the civil aspect of the matter, I do not quite agree with him, but he guarded himself against giving a confident opinion. When one is considering the decisions, so well known in England, of *Lee* v. *Butler* (1) and *Helby* v. *Matthews* (2), which latter case (decided by the House of Lords) practically settled all legal controversy about these agreements, one must remember that in those cases the Courts were deciding whether the hirer could confer a good title upon a purchaser. That is a totally different question from the question whether he had any legal right to sell, or any honest belief that he had a legal right to sell. It turns entirely upon section 9 of the Factors Act in England which, corresponding to section 43 of the Transfer of Property Act, gives a kind of statutory title to a purchaser in good faith, who has bought from a commercial factor who has been left in possession of the goods with the consent of the true owner under the conditions laid down by that section, which include a person "who has agreed to buy," and the question in these two cases was whether the agreement made him a person "who had agreed to buy," and what the House of Lords held was that a person who has an option to return the goods and not complete the purchase, cannot be held in the eyes of the law to be a person "who has agreed to buy." It was never suggested in either of these cases that the hirer was in fact the owner. Nor was it doubted that the agreement was a hire-purchase agreement in the colloquial sense of the term. But this question of civil law has no bearing at all upon the relationship between the owner and the hirer and upon the state of mind of the hirer when he sells. Mr. Cadd, when he signed this agreement, knew perfectly well that he was hiring the lorry, and that he would never become the owner unless he paid the whole sum due, and that he had no right to sell it as though it were his. As the learned Sessions Judge says, "the agreement is straightforward and clear." There are four features in it which are conclusive against the honest belief of any commercial man signing this agreement that the car was his to sell: (1) He calls himself the hirer. (2) He binds himself by a legal obligation to insure the car, a thing which no owner

(1) (1893) 2 Q. B., 318.
(2) (1895) A. C., 471.

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ever did or could do. (3) He agrees not to deal with the car, and to allow the owner to recover possession in case of default. (4) On the very page where his signature appears, he agrees that it shall remain the property of the owner.

He clearly had no title other than that of a hirer with a right to become the owner if he chose to pay the last instalment, and it is idle to read a section from the Contract Act providing that the property shall pass on certain conditions, when the parties by their solemn agreement have stated that it shall not pass except on the performance of one condition only. It is difficult to see how Mr. Cadd could possibly get a title to this car. I am not concerned to discuss this question, but unless there is something in the law of India corresponding to section 9 of the Factors Act, the title always remained in the Motor Traders Ltd., and could not be transferred by Mr. Cadd in any way upon a third person. So that the person really defrauded is the purchaser.

This brings me to the question of sentence. That question was not pressed upon the Sessions Judge, but it has been pressed upon me, and rightly pressed, because it appears to me that there are grounds for interfering with the sentence. I guard myself against saying one word in justification or palliation of a dishonest act of this kind. Mr. Cadd knew quite well that it was wrong to sell. He could have tested that question by sending a reply-paid telegram to the Motor Traders Ltd., asking their permission to sell. I know, and he knew quite well, what the answer to that telegram would have been. But it does appear that he made an honest attempt to carry out his agreement. He paid the insurance, he paid the expenses of the Motor Traders Ltd.'s representative, and he paid, in the uncertain way in which these people always pay, instalments from time to time, and he went on paying even after he had sold. If these payments were made voluntarily, they show that his dishonest intention was very much qualified by a desire to do what was right and to avoid loss to the owner. If the payments were made and accepted to prevent criminal proceedings, this is a vindictive prosecution by the Motor Traders Ltd., because they have failed to get their money. The Sessions Judge further says that the Bhagwan Ice Factory, whose disposition to do well seems to be larger than their banking account, because their cheques were dishonoured, undertook to pay instalments out of Mr. Cadd's salary, and I

rather assume that that undertaking was given to the Motor Traders Ltd., so that everything points to the latter having put pressure upon the accused and his employers to get their money. In addition to that they are secured by a surety who, if he is worth the money, will indemnify the Motor Traders Ltd. against loss. He has given assurances of his desire to pay, but he has not followed them up by a payment in cash which would be the most satisfactory proof of his good intentions, and so far he has only filed an offer before the one court which had no jurisdiction to enforce it. But further still, in my opinion, the Motor Traders Ltd. have a claim against the purchaser for the return of the car, and if they succeed in establishing that claim they will have done rather well, except for the inconvenience of having to prosecute one of their hirers. But even further still, it appears that the accused has been made an insolvent, and what the value of a fine may be when inflicted upon a man who has got no assets to pay it with, I do not know. As it was inflicted after the adjudication, I presume the receiver is not bound to pay, and it will, therefore, result in the accused having to serve another three months' imprisonment. Under all the circumstances, although the nature of the offence is not one to be condoned, the degree of guilt varies in different cases, and I am inclined to think that Mr. Cadd, who undoubtedly has been unfortunate, made an honest attempt to meet the foolish and wrongful course of conduct into which he had drifted. On these grounds I should certainly, if there had been an appeal to me, have cancelled the fine and the imprisonment awarded in lieu thereof. I, therefore, alter the sentence to one of three months' simple imprisonment only and direct him to surrender to his bail and serve out under simple imprisonment the balance of the three months' imprisonment to which he was sentenced. The fine, if paid, will have to be repaid to the receiver of his estate.

Sentence altered.

APPELLATE CIVIL.

1923 May, 8.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Piggott.

AHMAD-ULLAH (PLAINTIFF) *v.* ABDUL RAHIM (DEFENDANT).*

Act No. IV of 1882 (Transfer of Property Act), section 83—Mortgage—Deposit of mortgage money by mortgagor—Refusal of mortgagee to accept deposit.

A deposit made by a mortgagor under the provisions of section 83 of the Transfer of Property Act, 1882, does not have any effect on the relations between the mortgagor and the mortgagee unless and until such deposit is accepted by the mortgagee. If the deposit is refused and the mortgagor is dissatisfied with the action of the mortgagee in refusing the deposit, it is for him to bring a suit for the enforcement of his legal rights, and unless he does so successfully, the mortgage subsists.

THE facts of this case appear from the following judgment of the lower appellate court :—

"This is an appeal against a decree of the Munsif of Agra dismissing the plaintiff's claim for ejectment and recovery of Rs. 36 rent. The facts are that the defendant was owner of the house in suit and mortgaged it to the plaintiff with possession but on the same day took it on rent at Re. 1 per month under a *sarkhat*. The rent of three years fell into arrears and the plaintiff gave a notice under section 108 of the Transfer of Property Act but the defendant refused to vacate the house and, therefore, this suit was filed. The defence was that the mortgage was no longer subsisting as the mortgage money had already been deposited under section 83, and, therefore, the plaintiff had no right to bring this suit. The learned Munsif has held that the mortgage money had been deposited and, therefore, this relationship of landlord and tenant no longer subsisted between the parties, and on that finding he has dismissed the suit. The plaintiff appeals and the only point for determination is whether the fact that the mortgage-money has been deposited under section 83 extinguished the mortgage. It is admitted that the tender under section 83 was not accepted by the plaintiff. I do not see how it can be said that the mortgage has been extinguished. When a tender under section 83 is not accepted, the mortgagor can bring a suit for redemption, but if the tender extinguishes the mortgage, how can a suit for redemption be brought. No suit for redemption can be brought after the mortgage is extinguished. A tender under section 83, when not accepted, does not extinguish the mortgage and the mortgagee continues in possession as a mortgagee though he is liable to account from the date of the tender. (See 9 Bom., L. R., 958.) I do not agree with the learned Munsif that the mortgage has been extinguished and the relation of landlord and tenant does not subsist between the parties. They are still mortgagee and mortgagor and landlord and tenant. The appeal prevails and is allowed with costs. The result is that the plaintiff's suit is decreed with costs in both the courts."

The defendant appealed and the decree of the lower appellate court was reversed by a single judge of the Court, by the following judgment :—

"The facts are as follows :—

Sheikh Abdul Rahim executed a mortgage of a house, in Agra, by way of conditional sale on the 26th of June, 1916, in favour of Sheikh Ahmadullah for a consideration of Rs. 99-15-0. On the following day, Abdul Rahim executed a *kirayanama* by which he agreed to take the house for three years as tenant from the mortgagee on a monthly rent of one rupee. The deed provided for redemption within a period of six years. Sheikh Abdul Rahim continued in possession of the house during the period prescribed in the *kirayanama* and afterwards. In the year 1918 he was still in possession, although the term of the *kirayanama* had expired nearly 5 years before. He owed three years' rent. He then mortgaged the property again to Musammat

Mariam, and it was agreed that she should pay Rs 99-15-0 to redeem the first mortgage and Rs 36, which he owed for rent, to Ahmad-ullah. She accordingly paid Rs 135-15-0 into court under section 83, Act IV of 1882, on the 3rd of April, 1918. Ahmad-ullah refused to take the money out. Ahmad-ullah instituted a suit on the 4th of September, 1918. He did not say anything in the plaint about the existence of the mortgage, or the fact that the mortgage money and the rent due had been tendered to him. He stated that Abdul Rahim was a monthly tenant of the house and that he had served a notice on him to quit because he had not paid three years' rent. He sued for Rs. 36 rent and for the ejectment of Abdul Rahim. The learned Munsif dismissed the suit. He held that although the mortgage was not extinguished by the tender, the tender was a good tender and a tender which the plaintiff ought to have accepted, and that, after the tender was made, the plaintiff's position resembled that of a trustee on behalf of the defendant. As the arrears of rent had also been tendered, he came to the conclusion that the plaintiff was not entitled to eject the defendant or to any other relief. An appeal was filed to the court of the Subordinate Judge. The learned Subordinate Judge came to the conclusion that the mortgage still existed, and that the plaintiff was entitled to possession as mortgagee and as landlord. He, therefore, decreed the suit. The case comes here in second appeal. The courts below have not quite appreciated the facts. The mortgage is a mortgage by conditional sale. It is not a usufructuary mortgage. It contained a clause that the mortgagor could not redeem after six years had elapsed. This clause could not operate to extinguish the mortgage until the plaintiff had obtained a decree for foreclosure. It is very clear what the plaintiff has done. He wishes to obtain the property. He has, therefore, refused to accept the tender. If he can get possession of the property, he thinks he will be in an assured position, for then, if the defendant goes to redeem he will put up against him the clause in the mortgage deed debarring him from redemption after six years. I express no opinion on the value of this plea, but he evidently thinks it a good one. Unless he can obtain possession he will be in not so good a position, for then he must apply for foreclosure and then the court will be in a position, apart from the provisions of the deed, to allow the defendant an opportunity of redemption. This is, I think, the reason why he has said nothing about the terms of the mortgage deed in his plaint. He has clearly brought this suit for ejectment of the defendant as his tenant in order to enforce his mortgage. The suit should have been a suit for foreclosure. For the reasons that the plaintiff has deliberately not disclosed the true facts and has sought a wrong remedy his suit must be dismissed. I, therefore, allow the appeal and direct that the plaintiff's suit stand dismissed. The plaintiff will pay his own costs and those of the defendant in all courts."

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The plaintiff appealed under section 10 of the Letters Patent.

Pandit *Uma Shankar Bajpai*, for the appellant.

Munshi *Narain Prasad Asthana*, for the respondent.

MEARS, C. J., and PIGGOTT, J.:—The facts out of which this appeal arises are best stated in the judgment of the lower appellate court, dated the 24th of July, 1919, where the essential question for determination is clearly set forth. That question is whether the making by a mortgagor of a deposit, under section 83 of the Transfer of Property Act, *ipso facto* extinguishes the mortgage in spite of the fact that the mortgagee has refused to accept the deposit. In our opinion that question can only be answered as it was answered by the lower appellate court—the mortgage is not extinguished. The parties remain in the relationship to one another of mortgagor and

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mortgagee. It is for the mortgagor, dissatisfied with the action of the mortgagee in refusing to accept the money deposited in full satisfaction of the mortgage, to bring a suit for the enforcement of his legal rights. Unless and until he does so successfully, the mortgage still subsists. There is some complication introduced into the present case by the fact that the mortgage had been followed by a contract of tenancy, the mortgagee having left the mortgagor in possession as his tenant. We do not see that this circumstance in any way affects the principle we have just laid down, or the applicability of that principle to the parties whose case is now before us. The mortgagee is constructively in possession of the property through his tenant, who happens to be also his mortgagor. He is entitled to a decree for ejectment. If the claim for rent, which was also put forward by the plaintiff in the suit, had been on account of rent falling due after the deposit made on behalf of the mortgagor, it would have been necessary for the court to consider the operation of section 84 of the Transfer of Property Act, No. IV of 1882. But the claim is on account of rent which fell due before that date. We think the decision of the lower appellate court was right and that it should not have been disturbed by the learned Judge of this Court. We allow this appeal, set aside the decree of the learned Judge of this Court and restore that of the lower appellate court. All costs in this Court will be paid by the defendant respondent.

Appeal allowed.

REVISIONAL CRIMINAL.

1923

May, 4.

Before Mr. Justice Walsh and Mr. Justice Kanhaiya Lal.

EMPEROR *v.* MUHAMMAD YAKUB ALI.[1]

Criminal Procedure Code, section 32—Sentence—Appeal—Enhancement of sentence by appellate court.

A magistrate of the second class having convicted an accused person under section 406 of the Indian Penal Code sentenced him to three months' simple imprisonment. On appeal the appellate court, whilst upholding the conviction, altered the sentence to a fine of Rs. 400 with an alternative term of rigorous imprisonment.

Held that the sentence passed by the appellate court was *ultra vires* of that court.

THE facts which gave rise to this reference are thus stated in the Sessions Judge's order :—

"This is an application for revision of an appellate order of the Joint Magistrate of Roorkee, dated the 1st of February,

[1] Criminal Reference No. 185 of 1923.

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1923 The applicant was tried and convicted by a second class Magistrate on a charge under section 406 of the Indian Penal Code and sentenced to three months' simple imprisonment. The learned Magistrate on appeal affirmed the conviction, but varied the sentence passed. He altered it from one of three months' simple imprisonment to a fine of four hundred rupees. The second class Magistrate who tried the case could have imposed a fine of two hundred rupees only, under section 32 of the Code of Criminal Procedure. It is argued that the powers of an appellate court to vary a sentence must be measured by those of the court of first instance. A ruling of the Judicial Commissioner's Court, Nagpur, 7 N. L. R., 109 (12, Criminal Law Journal, 444) has been referred to. I think that the argument cannot be refuted. Apart from this, six months' imprisonment must be deemed to be equivalent to two hundred rupees' fine in view of section 32(1) (*b*), and it is a moot question if the imposition of a fine of four hundred rupees would not be an enhancement of the sentence: Cf. *Empress* v. *Meda* (Weekly Notes, 1887, p. 100). It will be noticed that in the appellate order which is attacked, the imprisonment in default of the payment of the fine has been made rigorous, while the original sentence was one of simple imprisonment. It was said in *Queen-Empress* v. *Peman* (Weekly Notes, 1890, p. 170), that the imprisonment of solitary confinement is an enhancement, even though the sentence of imprisonment be reduced. On the same principle, the substitution of rigorous imprisonment might be held to be an enhancement. But I take it that the lower appellate court, in varying the sentence, was bound by the limitations imposed by section 32 on the trial court. On the facts, which are seldom open to re-examination in revision, I see no good ground for interference. I would refer the order to the Hon'ble High Court, as I hold that the Joint Magistrate's order was *ultra vires* and therefore illegal."

The Assistant Government Advocate (Mr. *R. Malcomson*), for the Crown.

The opposite party was not represented.

WALSH and KANHAIYA LAL, JJ.:—We accept this reference and restore the sentence to the original three months' simple imprisonment given by the Magistrate who tried the case. The fine, if paid, will be refunded.

Original sentence restored.

PRIVY COUNCIL.

P. C.* 1923 July, 3

LALA RAM SINGH AND OTHERS (PLAINTIFFS) v. DEPUTY COMMISSIONER OF PARTABGARH (DEFENDANT).

[On appeal from the Court of the Judicial Commissioner of Oudh.]

Oudh Taluqdari Estate—Construction of Deed of Settlement—"Heirs and Representatives"—Act No. I of 1869 (Oudh Estates Act), sections 15, 22—Hindu Law—Mitakshara—Father dies and self-acquired property to son.

The holder of an Oudh taluqa in list 2 under Act I of 1869 executed in 1871 a deed of settlement which provided that after the deaths of himself, and the son and widow of his eldest son (to each of whom a life interest was given), his second son *L* "and his heirs and representatives" should succeed to the entire estate as provided by s. 22 of Act I of 1869.

Held (1) that *L* took an absolute interest in reversion. The words "heirs and representatives" were to be treated as words of limitation, not purchase; and the words "as provided by s. 22 of Act I of 1869" could be rejected, either as an idle attempt to derogate from the statute as words of description inappropriately used; thus avoiding a construction involving an attempt to create a line of succession quite alien under the rule in the *Tagore Case* (1).

(2) That *L* took the estate as self-acquired, not ancestral, property, and could dispose of it by will. Before the deed was executed the estate was held under the Act, and would have descended to a single heir thereunder and not according to the Mitakshara Law; it was therefore unnecessary to decide whether in the case of a device to a son of [illegible] property, which otherwise would have descended according to the Mitakshara, the son takes the property as ancestral or self-acquired. The conflicting decisions of the Privy Council on that question were reviewed.

Judgment of the court of the Judicial Commissioner affirmed.

APPEAL (No. 104 of 1922) from a decree of the court of the Judicial Commissioner (April 4, 1919) affirming a decree of the Subordinate Judge of Mohanlalganj.

The suit was instituted by Narain Singh, represented by the appellants, against Avadesh Singh, a minor represented by the respondent, to recover possession of a taluqa named Rampur Kadhaula.

The material facts appear from the judgment of the Judicial Committee.

The trial Judge dismissed the suit, and that decision was affirmed (though on different grounds) upon appeal to the court of the Judicial Commissioner. The effect of the judgments appears from the present judgment. The question of *res judicata*, one of the grounds of the decision of the trial Judge, not being material to the present decision, it is not necessary to state the facts as to it.

1923, *June 4, 5, 6, 7.*—*Sir George Lowndes, K. C.* and *Normanby Brown* for the appellants: The appellate court rightly reversed the finding of a custom of lineal primogeniture, but erred in allowing a new defence based on the deed

* *Present*: Lord SUMNER, Lord PHILLIMORE, Sir JOHN EDGE, and Mr. AMEER ALI.

(1) (1872) L. R., I A., Supp., 47.

of 1878 and the alleged will of 1886. The limitation to Lachman Singh and "his heirs and representatives . . . as provided by s. 22 of Act I of 1869" was invalid under the rule in the *Tagore Case* (1), as laying down a rule of inheritance other than that presented by law: *Rajindra Bahadur Singh* v. *Raghubans Kunwar* (2). If Lachman had a vested interest under the deed, it was merely a life interest: *Tarokessur Roy* v. *Soshi Shikhuressur Roy* (3), *Kristoromoni Dasi* v. *Narendro Krishna* (4). *Bhoobun Mohini Debya* v. *Hurrish Chunder Chowdhry* (5) is distinguishable on the words of the deed; the decision helps the appellants as showing that a benignant construction should be adopted. *Ghulam Abbas Khan* v. *Amatul Fatima* (6) was also referred to. If, however, Lachman took absolutely, he took the estate as ancestral property and could not dispose of it by will. On this point reference was made to the Mitakshara, Ch. I, s. 4 (1)(6)(28) and s. 6 (13), and to the series of decisions in India referred to in the judgment of their Lordships.

De Gruyther, K. C., Wallach, and *Dube* for the respondent:—

(Their Lordships being satisfied that Lachman did not take otherwise than absolutely.) It was admitted that the estate was impartible by custom; Lachman accordingly took the estate under the settlement as impartible property, and the further descent of the estate was subject to that custom: *Bhai Narindar Bahadur Singh* v. *Achal Ram* (7); *Janki Prasad Singh* v. *Dwarka Prasad Singh* (8); *Ghulam Abbas Khan* v. *Amatul Fatima* (6). Consequently even if Lachman took the estate as ancestral property he had the right of alienation which attaches to impartible estates: *Sartaj Kuari* v. *Deoraj Kuari* (9); *Baijnath Prasad Singh* v. *Tej Bali Sahai* (10). But Lachman did not take it as ancestral property: first, because he would not have taken under an intestacy, secondly, because if he had taken under the Act he would have had the power of disposition.

(1) (1872) L. R., I. A., Supp., 47.
(2) (1918) I. L. R., 40 All., 470; L. R., [illegible]
(3) (1888) I. L. R., 9 Calc., 952; L. R., [illegible]
(4) (1886) I. L. R., 16 Calc., 861; L. R., [illegible]
(5) (1876) I. L. R., 1 Calc., 23; L. R., [illegible]
(6) (1920) I. L. R., 43 All., 367; L. R., [illegible]
(7) (1903) I. L. R., 30 Calc., [illegible]
(8) (1913) I. L. R., 35 All., [illegible]
(9) (1886) I. L. R., 10 All., [illegible]
(10) (1921) I. L. R., 43 All., [illegible]

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[Mayne's Hindu Law, para. 275, was referred to.] The Indian decisions upon consideration support the respondent on this point.

Sir George Lowndes, K. C., in reply:—The effect of s. 15 is that in Lachman's hands the estate was not to be regarded as a taluqdari estate; no custom by which acquired property was impartible was set up. The descent is therefore not governed by custom. *Murtaza Husain Khan* v. *Muhammad Yasin Ali Khan* (1) is conclusive in favour of that contention; *Sitla Bakhsh Singh* v. *Sital Singh* (2) accords with it. Lachman took the property as ancestral property. Under s. 15 of the Act the estate is to be regarded as if Lachman had "bought" it; further the property was not acquired without detriment to the joint family estate, as it was paid for by his father. [Mayne, para. 275, was referred to.] In the conflict of authority in India, the long established view of the Calcutta High Court is right.

July 3.—The judgment of their Lordships was delivered by LORD PHILLIMORE:

The dispute in this case concerns the succession to a taluqdari estate in Oudh, which at the time of the confiscation was held by one Raja Hanwant Singh, the ancestor of all the parties. Their position would best be explained by a short pedigree.

Raja Hanwant Singh
(died 24th June, 1854)

Lal Partab Singh = Dirauj Kunwar (died in 1857) (died in 1887)	Lachman Singh (died 18th July, 1888)
Ram Rampal Singh (died 28th Feb., 1901)	
Lal Ram Pracad Singh (died in 1901)	Babu Narain Singh (plaintiff)
Ram Gulam Singh *alias* Ramesh (died August, 1910)	Ram Din Singh, Ram Adhin Singh — Three Sons (now appellants)
Ayadhesh Singh defendant respondent	Brijesh Singh (alive)
	Suresh Singh (alive)

(1) (1916) I. L. R., 38 All., 652; L. R., 43 I. A., 269.
(2) (1921) I. L. R., 43 All., 215; L. R., 48 I. A., 245.

Narain Singh, the original plaintiff, is dead, and his three sons take his place as the present appellants. The defendant respondent being a minor, is represented by the Deputy Commissioner as Manager of the Court of Wards.

The occasion for the dispute arose upon the death of Ram Rampal Singh in 1909, on which occasion Ram Gulem Singh claimed the estate and procured mutation of names in his favour. He did not live long and was succeeded by the minor, whose interest is represented by the Manager of the Court of Wards. In 1913, the plaintiff, Narain Singh, brought the present suit to dispossess him.

The estate is one of those governed by the Oudh Estates Act, 1869 and is in list 2, defined by the Act as " A list of the taluqdars whose estates according to the custom of the family on and before the thirteenth day of February, 1856, ordinarily devolved upon a single heir."

Hanwant Singh, before he received his sanad, had executed a deed of gift in favour of his grandson, Rampal Singh, of all his properties, except six villages. Disputes having arisen as to the nature and operative effect of the gift, the Raja, on the 16th of May, 1871, filed a suit against Rampal Singh in the court of the Deputy Commissioner of Sultanpur, praying for a declaration of his absolute proprietary right, notwithstanding the execution of the deed of gift.

The grandson appeared and defended the suit; and thereupon a compromise was arrived at, which was embodied in an agreement between the parties, which again was confirmed by a decree of the court. In compliance with that agreement Hanwant Singh executed an instrument which may not inappropriately be called a settlement. This document provided that Hanwant Singh should for his life be the proprietor in possession of one of the taluqdari estates. He was to have no power to make a will, sale or transfer affecting the estate beyond his life-time. Rampal Singh was to have another estate similarly for his life only. On the death of Hanwant, Rampal was to have the whole of the taluqdari estates, but again for his life only, except that he had power to make a certain provision for his widow or widows, sons and daughters.

If Rampal Singh predeceased Hanwant Singh, Durgaj Kunwar, mother of Rampal Singh, was to have Rampal's estate for her life. If both she and Rampal Singh died in the life of Hanwant Singh, Hanwant was to have the absolute

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proprietary right with the power of making a will, sale or transfer in accordance with the authority given by the Act of 1869. If, on the other hand, the order of deaths was that Hanwant Singh died first, and then Rampal Singh, in that event the mother was to be owner of the whole taluqdari estate for her life with similar restrictions. Then came the last limitations which are the important ones in this case. The actual settlement was drawn up and executed in Urdu, and the official translation of this paragraph is as follows:—7. That on the death of the last three persons, *i.e.*, Raja Hanwant Singh, Raja Rampal Singh and Dirgaj Kunwar, the mother of Raja Rampal Singh, Babu Lachman Singh, the second son of Raja Hanwant Singh, and his heirs and representatives, shall succeed to the entire Rampur Kaithaula estate, as provided by section 22 of Act I of 1869. But the said Babu Lachman Singh shall not interfere in any way with the said *ilaqa*, beside the six villages which he has received under section 8, during the life-time of Raja Rampal Singh and his mother, Dirgaj Kunwar.

As the pedigree shows, Hanwant Singh died first, then the mother, then Lachman Singh, and lastly Rampal Singh, upon whose death it became necessary to determine who succeeded to the reversion. Rampal Singh seems to have died without leaving a son, but if he had left sons, they would have been excluded.

Now section 15 of the Act of 1869 provides as follows:—"If any taluqdar or grantee shall heretofore have transferred or bequeathed, or if any taluqdar or grantee, or his heir or legatee, shall hereafter transfer or bequeath, to any person not being a taluqdar or grantee the whole or any portion of his estate, and such person would not have succeeded according to the provisions of this Act to the estate or to a portion thereof if the transferor or testator had died without having made the transfer and intestate, the transfer of, and succession to, the property so transferred or bequeathed shall be regulated by the rules which would govern the transfer of, and succession to, such property if the transferee or legatee had bought the same from a person not being a taluqdar or grantee."

This transaction took place before the amending Act of 1910: so that a transfer to a person who is not the immediate successor, even though that person be in the line of succession, operates to take the estate out of the special limitations of

descent The principle has been finally established by the case of *Ghulam Abbas Khan* v. *Amatul Fatima* (1).

In these circumstances the original plaintiff Narain Singh, the father of the present appellants, claimed to succeed to the whole estate under the Mitakshara Law of the Benares School, or alternatively under a will executed by Lachman Singh; and the original defendant Gulem Singh *alias* Ramesh set up as defences that the deed of settlement was invalid, that the plaintiff was estopped under the principle of *res judicata*, that the estate was impartible, that he was the heir according to the custom of the tribe or family, which he said was the custom of lineal primogeniture, that the alleged will of Lachman Singh was fictitious, and that in any event, Lachman Singh had no power to dispose of the talukdari estate by will. Fortunately, for him, though he did not rely upon it at the time as a defence, he introduced among the documents which he filed, a will of Lachman Singh in his favour. In the event, he got a decision from the Subordinate Judge in his favour on the points of *res judicata*, and the family custom of lineal primogeniture—the Subordinate Judge further holding that the plaintiff had not proved that will of Lachman Singh on which he relied.

The case then came on appeal to the court of the Judicial Commissioner. Here the learned Judges agreed with the Subordinate Judge that the will upon which the plaintiff relied had not been proved. But they disagreed with him in his decision as to *res judicata* and the family custom, which latter they held not to be proved Nevertheless, they decided in the defendant's favour because they held, contrary to his original submission, that Lachman Singh could validly dispose of his property by will, he having, according to their views, an absolute estate in reversion and not a life estate only Having thus allowed the defendant to reverse his original position to so large an extent, they, as it seems to their Lordships, very properly gave him a decision without costs.

On appeal to this Board the heirs of the original plaintiff, while not abandoning their father's position that he was entitled as next heir either to Hanwant Singh or to Lachman Singh to the whole property, have also put forward a claim that the two sons of Lachman Singh were both of them heirs, and

(1) (1921) I L R, 43 All, 297; L R., 48 I A, 135.

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that they, as representing one of these sons, should have half the property.

Now, for this purpose they had to abandon the original case, which was that Lachman Singh could dispose of the property by will and had disposed of it in their father's favour. On the contrary they now say that he had only a life estate and could not, in any event, pass the property by will.

In this tangle of claims and defences, it appears to their Lordships that the points which now remain to be decided are these:—

1. What estate or interest did Lachman Singh take under the settlement? If he took only a life estate, then the reversion descended to the heir or heirs of Hanwant Singh. If he took an absolute estate, then—
2. Had he the power to dispose of it by will? and this question raises a new point which was not discussed in the courts below. If he could not dispose of it by will, then—
3. Who are his heirs? In connection with this point, it would have to be decided whether the estate in Lachman's hands was partible or impartible.

Now as to the first point, it was strongly contended on behalf of the appellant, that the right way to read clause 7 was to read it as an endeavour to fix the course of succession in the line prescribed by section 22 of the Act of 1869, though the effect by virtue of section 15 would be to take the estate out of the Act; and that, therefore, this was an attempt to create an order of succession unknown to the common law and unwarranted by the Act, which has been decided to be impossible by the judgment in the *Tagore* case (*Jatindra Mohan Tagore* v. *Ganendra Mohan Tagore*) (1), and by various subsequent decisions.

It followed (so the argument proceeded) that the limitations were good so far as they gave Lachman a life estate, but that everything after this must be rejected as contrary to law, and that therefore the reversion to the estate after the death of Lachman remained undisposed of.

It was also submitted that the point might be put in this way; the grant of a life estate to Lachman would not—supposing him to be out of the line of succession—necessarily operate

(1) (1872) 9 Beng. L. R., (P. C.) 377; L. R., I. A., Supp., 47.

under section 15 as a destruction of the special taluqdari entail, and the settlement would anyhow be effective so far as it granted that life estate, but the transfer of the absolute ownership would operate, under section 15, to break the taluqdari entail, and would therefore subject the property to the ordinary Hindu Law of inheritance to which the taluqdari entail would be repugnant, and that therefore the further limitation by reference to section 22 of the Act would be invalid and inoperative Another suggestion was that the clause should be read as giving a life estate to Lachman and then the reversion to his heirs, who being unborn persons, could not take under Hindu Law.

The words in clause 7 are undoubtedly difficult of construction; but their Lordships, in dealing with an instrument of this kind carrying out a decision of the court, ought to take for their guidance the rule that, if possible, such a document should be construed, *ut res magis valeat quam pereat*.

On the whole, their Lordships are disposed to accept the construction which the Subordinate Judge and the appellate court put upon this clause of the settlement In the first place they think that, to borrow a phrase from the English Law of real property, the words "heirs and representatives" are to be treated as words of limitation and not of purchase, that is, that they are merely intended to express the absolute estate which it was proposed to give to Lachman as distinguished from the life estates which had preceded it. This being so, the later words in the sentence may be regarded either as an idle attempt to derogate from the grant previously made and therefore to be rejected, or as words of description only, stating the legal incidents which the grantor conceived to belong to the estate which he had granted. In this case his mistake as to the legal consequences does not affect the grant which he has made. They think, therefore, that Lachman received an absolute estate in reversion

The next point for consideration is whether Lachman could dispose by will of the estate which was vested in him. This depends upon the question whether it was to be deemed ancestral property or self-acquired property. On this point their Lordships have little assistance from the courts below. It could not have been considered by the Subordinate Judge, because the respondent was not then relying on Lachman's will It probably was not argued before the appellate court

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because counsel for the appellant had so little opportunity of addressing himself to this new point. But the appellate court, though without giving any reasons for it, did incidentally state its opinion that the property was self-acquired property.

It appears that there has been great diversity of opinion in the High Courts in India as to the effect in a Mitakshara family of a bequest made by a father of property which in the father's hands was self-acquired, to his son. In Calcutta, in 1863, the point first arose in the case of *Muddun Gopal* v. *Ram Baksh* (1), when it was held that such property would be ancestral, and this has been followed in the later case of *Hurri Mull Baba* v. *Hemnauth Adhurjya* (2), decided in 1912. In Madras, upon the whole, the view seems to be that the father can determine whether the property which he has so bequeathed, shall be ancestral or self-acquired, on the principle of *cujus est dare, ejus est disponere*, but that unless he expresses his wish that it should be deemed self-acquired, it is ancestral. See *Tara Chand* v. *Reeb Ram* (3), and compare it with *Nagalinga* v. *Ramachandra* (4), and other cases. In Bombay, on the other hand, the principle of intention seems to have been accepted if it makes the property ancestral, but if there be no expression of intention it is deemed self-acquired. See *Jamiatram's* v. *Sir Mangaldas Nathubhoy* (5) and *Nanabhai* v. *Achrathai* (6). At Allahabad the decision was that such property is self-acquired. See *Parsotam* v. *Janki Bai* (7), decided in 1907. Finally, in Oudh, in the case of *Rameshar* v. *Musammat Rukmin* (8), decided in 1909, after a review of all the cases, it was held that: Where self-acquired property is bequeathed to sons, in the absence of language clearly indicating the testator's intention that the property should be held by the sons subject to the incident of survivorship, it should be presumed that each son takes an interest which passes to his heirs at his death.

If the criterion were to be the intention of the father when he makes the gift, there is nothing to indicate that Hanwant Singh desired to make the estate ancestral property in the

(1) (1863) 6 W. R., 71.
(2) (1912) 17 C. W. N., 250
(3) (1886) 3 Mad. H. C., 50.
(4) (1901) I. L. R., 24 Mad., 422
(5) (1886) I. L. R., 10 Bom., 528.
(6) (1888) I. L. R., 12 Bom., 122.
(7) (1907) I. L. R., 29 All., 354.
(8) (1911) 14 Oudh Cases, 241

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hands of Lachman. His expression of opinion or desire, whichever it may be, that the property should still be governed by the Act of 1869 would indicate the contrary view; because under the Act each holder of the estate has a power to give it or will it away. If, on the other hand, Hanwant should be treated as having intended the legal consequences of his acts, he had brought the estate under section 15; and then the argument urged by Counsel for the respondent founded on the words at the end of that section by which property is to be regulated by the rules which would govern succession to it, if the transferee or legatee had bought it, would have to be considered.

But their Lordships deem it unnecessary to pronounce upon these points. It may be that some day this Board will have to decide between the conflicting decisions of the Indian High Courts, and it may be that when this time comes, this Board will prefer to go back to the original text of the Mitakshara and put its own construction upon that text. It is not necessary to do so in this case.

The principle upon which it is contended that such property should be deemed ancestral property, is that the son is only getting by his father's will that which, but for the will, he would have received by descent according to the Mitakshara Law. Now before Hanwant Singh made the settlement, the property was subject to the Act of 1869 and would have descended to a single heir in accordance with that Act, and would not have descended according to Mitakshara Law or to those whom that law would designate as heirs. The principles, therefore, of Mitakshara Law—if that law be as the High Court of Calcutta has thought and the appellant contends—would not apply to regulate the descent. Lachman, therefore, took the property as self-acquired property and could dispose of it by will.

It becomes, therefore, unnecessary to consider who would be the heir or heirs of Lachman if he had died intestate.

In result, their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Solicitors for appellants: *Watkins and Hunter.*

Solicitor for respondent: *Solicitor, India Office.*

REVISIONAL CIVIL.

1923
April, 12.

Before Sir Lancelot Sanderson and Mr. Justice Ryves.

KIRPA KISHAN KISHORI (APPLICANT) *v.* BABU LAL AND ANOTHER (OPPOSITE PARTIES).*

Guardian ad litem - Power of court to appoint or to object to a proper guardian - Date from which to revive suit - Civil Procedure Code, section 115 - Suit started from the time when appointment of a guardian becomes necessary.

Where a decree in a suit against a minor has been set aside upon the ground that the minor defendant was not properly represented, and application is thereafter made for the continuance of the suit on a proper appointment of a guardian to the minor being made, the correct order to be made is that the suit be revived as from the time when the appointment of a guardian to the minor defendant becomes necessary. *Ukangwan Dayal* v. *Param Sukh* (1), referred to.

THE facts of this case were as follows :—

The present applicant Musammat Kirpa Kishan Kishori brought a suit, No. 31 of 1920, for possession of a house on the basis of a sale-deed executed in her favour by Dhani Ram for self and professedly as guardian of his minor nephews, Babu Lal and Jodhai. In the suit Dhani Ram was proposed as guardian *ad litem* of Babu Lal and Jodhai, and although Babu Lal made an application that he was a major and that Dhani Ram was not a proper person to be guardian of Jodhai, that application was somehow lost sight of, and Dhani Ram was appointed guardian *ad litem* of Babu Lal and Jodhai. The suit was decreed, and the plaintiff got possession. Then Babu Lal brought a suit, No. 129 of 1921, for himself and as next friend of Jodhai for a declaration that the decree in suit No. 31 of 1920 was not binding against them as they had not been properly represented therein. In this suit it was held that Dhani Ram and his nephews were not members of a joint Hindu family, that he had no right to execute any sale-deed on their behalf, and that they had not been properly represented in the former suit. This suit, No. 129 of 1921, was accordingly decreed. After that Musammat Kirpa Kishan Kishori filed an application, purporting to be an application in suit No. 31 of 1920, praying that the said suit be re-opened and re-decided against Babu Lal and Jodhai. The court rejected this application. Hence this revision.

Munshi *Durga Prasad*, for the applicant.

Mr. *Ibn-i-Ahmad*, for the opposite party.

* Civil Revision No. 153 of 1922.

(1) (1916) I. L. R., 39 All., 8.

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KIRPA KISHAN KISHORI v. BABU LAL.

WALSH and RYVES, JJ. :—We think the Judge has taken an altogether erroneous view in the matter. It is not perhaps surprising, as it is a very technical point, and it is extremely difficult to see one's way clearly through the proper procedure, but the matter is made absolutely clear by the luminous judgment of the late SIR SUNDAR LAL in *Bhagwan Dayal* v. *Param Sukh Das* (1), and if the Judge had had this decision brought to his notice and explained, he no doubt would have taken the view that we now take. We agree with the decision in that case. The *ratio decidendi* is that the previous suit having failed for want of a lawful guardian, the proceedings in it, including the decision, are a nullity from the point when the improper appointment of the guardian was made. It is not, therefore, a commencement of a fresh suit. It is not an application for re-hearing, because in the eyes of the law there has been none. It is not an application to restore. It is an application to revive it by the appointment of a proper guardian, so that from the date of such appointment it becomes a properly constituted suit in which the difference between the parties can be decided. We return the record to the court below, making the order which the lower court ought to have made, namely that the suit be revived as from the point at which the application for appointment of guardian is to be made. No appointment is now necessary in the case of Babu Lal who has become *sui juris*, but the other minor still requires a lawful guardian, and the plaintiff must apply to the trial court in due course for the appointment of a lawful guardian. It is understood that this order of revival is only as against the persons who were formerly sued as minors. There is a suggestion in the judgment under revision that some decision on the merits was come to in the original suit. Whether that is so or not, it must be clearly understood that, as against these two persons who were then sued as minors, there is no previous decision on the merits. If there was a previous decision it must be disregarded by the lower court. The whole case is to be tried *de novo*, starting its new life from the date of the application for the appointment of a guardian. The application is allowed with costs.

Application allowed.

(1) (1916) I. L. R., 39 All., 8

APPELLATE CIVIL.

1923
May 7

Before Mr. Justice Lindsay and Mr. Justice Sulaiman.

HARGOBIND SINGH (PLAINTIFF) v. HUKM CHAND AND OTHERS (DEFENDANTS).*

Pleadings—Suit for pre-emption, one John but described in a minor, but found to be a major and action as such in the suit—Plaint not amended—No ground for dismissal of suit.

In two suits for pre-emption relating to the same property one R D was impleaded as a defendant, being described in a manner under the guardianship of his mother. In these suits, however, although no amendment of the plaint was made, R D appeared by a vakil and contended that he was, and was found to be, of full age. The suits were dismissed by the lower appellate court on the ground that R D had been treated as a minor, though being of age.

Held, on appeal by the plaintiffs, that the mere fact that R D still remained described in the plaint as a minor was no ground for the dismissal of the suits. *Ramachara* v. *Duraisami Pillai* (1) and *Ganga Ram* v. *Mihin Lal* (2), referred to.

THE facts of the case sufficiently appear from the judgment of the Court.

Pandit *Mohan Lal Sandal*, for the appellant.

Babu *Piari Lal Banerji*, for the respondents.

LINDSAY and SULAIMAN, JJ.:—Second Appeals Nos. 140 of 1922 and 141 of 1922 are connected appeals and arise out of two suits for pre-emption. On the 27th of February, 1919, one Ant Ram executed a sale-deed of certain shares in mauza Pawaoli in favour of Hukm Chand, Sukhdeo and Rup Singh, defendants vendees. On the 25th of February, 1920, Har Gobind, who was a co-sharer in the village, instituted a suit No. 149 of 1920 for pre-emption of this property. This was followed by another suit instituted on the 27th of February, 1920, by Ram Dayal, Bansidhar and Jagram, numbered as suit No. 159 of 1920. The two plaintiffs Bansidhar and Jagram have since withdrawn from the suit. These two suits were instituted in the court of the Munsif.

A third suit was instituted in the court of the Subordinate Judge by Ram Dayal the second, but we do not know the date on which it was filed. Ram Dayal the second was impleaded in the two suits first mentioned but the plaintiffs of those suits were not impleaded in the suit by Ram Dayal the second. The first two suits were dismissed by the Munsif on the 15th of

* Second Appeal No. 40 of 1922, from a decree of Saiyid Iftikhar Husain, Subordinate Judge of Agra, dated the 22nd of September, 1921, confirming a decree of Banwari Lal Mathur, Munsif of Agra, dated the 15th of September, 1920.

(1) (1898) I. L. R., 21 Mad., 167.
(2) (1906) I. L. R., 28 All., 416.

September, 1920, and the third suit was decreed on the 10th of August, 1920.

The Munsif dismissed the plaintiff's suit on the ground that both sets of plaintiffs had notice of the sale and had refused to purchase the property. In the court of the Munsif Ram Dayal the second, who was the plaintiff in the third suit, was impleaded as a *pro formâ* defendant. He was originally alleged to be a minor and an application was made that he should be brought on the record under the guardianship of his mother Ram Dayal the second, however, appeared in both the suits and stated that he was of age The court of first instance went into the question of his minority and found that he was of age Ram Dayal the second was actually represented by a vakil in the court of first instance and contested the suit. No application for amendment of the plaint was, however, filed by the plaintiff, nor was any amendment ordered by the court The name of Ram Dayal the second, therefore, continued in the plaint as a minor under the guardianship of his mother When the plaintiffs appealed to the lower appellate court, they impleaded Ram Dayal the second as major and he was again represented by a vakil. The lower appellate court found in favour of the plaintiffs that it had not been established that they had any knowledge of the sale or that they had refused to purchase the property. It also found that the real sale consideration was Rs. 1,000. Both the suits were, however, dismissed on the technical ground that Ram Dayal had been treated in the court of first instance as a minor whereas in fact he was of age.

We are of opinion that the decrees of the lower appellate court cannot stand. It is true that no amendment of the plaint was made and the name of Ram Dayal continued to be entered as a minor All the same he had full knowledge of the proceedings in court. He actually appeared in court and was represented by his vakil as major and was also represented as such before the lower appellate court. Assuming that there was any irregularity, it was fully cured by the conduct of both the parties. We, therefore, think that this ground was no sufficient ground whatsoever for dismissing the suits altogether. The case of *Ramachari* v *Duraisami Pillai* (1) and that of *Ganga Ram* v. *Milan Lal* (2) are authorities in favour of the view we have taken

(1) (1898) I L R, 21 Mad., 167
(2) (1906) I L R, 28 All 416.

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HARDEO BIND SINGH v. HUKM CHAND.

It is found by the lower appellate court that all the three pre-emptors had equal rights and none had a preferential right. They, therefore, are entitled each to a one-third share in the pre-empted property.

We accordingly allow these appeals, set aside the decrees of the lower appellate court and decree the plaintiffs' suits as directed below. In view of the circumstances, however, each party should bear its own costs. The decree shall be prepared in accordance with order XX, rule 11.

The claim of each of the two plaintiffs is, therefore, decreed for a one-third share of the property on payment of one-third of the sale consideration as found above, within 60 days from this date. In case of non-payment it would be open to the plaintiff in the connected suit to deposit that amount within an additional period of 30 days and claim that one-third share also. On failure of payment by either of the two plaintiffs the appeals will stand dismissed with costs.

Appeal allowed.

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May, 7

Before Mr. Justice Rowe and Mr. Justice Daniels

RAM ADHAR SINGH AND ANOTHER (PLAINTIFFS) *v.* RAM MANOHAR SINGH AND ANOTHER (DEFENDANTS).[1]

Hindu Law—Hindu widow—Declaration of estate in favour of reversioner—Provision for maintenance of widow.

Although the gift of an estate by a Hindu widow in favour of the next reversioner must, in order to operate as an extinguishment of the estate in the latter, be a gift of the entire estate, nevertheless a reasonable provision for the maintenance of the widow will not vitiate such a gift. *Ramasami Goundan* v. *Nachappa Goundan* (1), *Bhavani Kuer* v. *Phatakbihari Prashad Singh* (2), *Sureshwar Misser* v. *Maheshwar Misrain* (3) and *Angammathu Chetti* v. *Varatharajulu Chetti* (4), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Hafiz *Mushtaq Ahmad* (for Maulvi *Iqbal Ahmad*), for the appellant, submitted that a mere provision for maintenance in a deed of surrender by a Hindu lady in favour of the next reversioner would not vitiate the surrender itself. Such a provision did not amount to retaining *an interest in the property* and was quite consistent with the lady's "effacement" as a legal entity. All that was necessary was that she should have

[1] Second Appeal No. 585 of 1922, from a decree of A. S. P. Dalton, District Judge of Benares, dated the 26th of January, 1922, reversing a decree of Kanhaiya Nath Rai, Subordinate Judge of Benares, dated the 21st of November, 1921.

(1) (1918) I. L. R., 42 Mad., 523.
(2) (1919) L. R., 46 I. A., 259; I. L. R., 47 Calc., 466.
(3) (1920) L. R., 47 I. A., 283; I. L. R., 48 Calc., 100.
(4) (1919) I. L. R., 42 Mad., 851.

genuinely divested herself of all her proprietary interest in, and ceased to hold any part of, the property He relied on *Sureshwar Misser* v *Maheshrani Misrain* (1) and *Angamuthu Chetti* v. *Varatharajulu Chetti* (2).

Their Lordships in I L R , 42 Mad , 523, did not either raise or decide the specific question of maintenance in deeds of surrender by Hindu widows. On the contrary, their observations on page 864 in another case in the same volume helped the appellant If the provision for maintenance were in fact a cloak or device for dividing the property with the reversioner, which was not the case here, it would certainly prevent the deed from operating as a valid acceleration, as held in *Sriramulu Naidu* v. *Amdalammal* (3) and *Ramachendra Thevar* v. *Nagamuthu Nachiar* (4). Even apart from the provision in the deed, it was the undeniable right of a Hindu widow to be supported out of her husband's property so long as it remained in the family The reversioner who took the property was bound, both morally and legally, to maintain her from the profits he received

Munshi *Harnandan Prasad* (with Dr *Surendra Nath Sen*) contended that by reserving her right of maintenance the lady in fact retained an important interest in the property. She did not absolutely surrender the estate. Moreover, the provision as to maintenance was inconsistent with "effacement" as that term was used by the Privy Council in I. L. R., 42 Mad., 523.

In I. L. R., 48 Calc., 100, a small portion of the property was returned by the reversioner after the surrender. The surrender itself, in so far as it went, had no such clause.

He relied on *Adiveppa* v. *Tontappa* (5).

Hafiz *Mushtaq Ahmad* was not called upon to reply, but he pointed out that the Privy Council case in I L R., 48 Calc , 100, came after the Bombay case cited by the respondent.

RIVES and DANIELS, JJ. :—The point for decision in this appeal is whether a gift of an estate by a widow in possession in favour of the next reversioner, which operates as an acceleration of the estate to the latter, is vitiated by its containing a provision for the maintenance of the widow. In this case Musammat Sumera Kunwar was in possession of the estate of her husband, Rameshar Singh, as a Hindu widow On the 22nd

(1) (1920) I. L. R., 48 Calc., 100
(2) (1919) I L R , 42 Mad., 851
(3) (1906) I L R , 30 Mad , 145
(4) (1919) 53 Indian Cases, 735
(5) (1919) I L R , 44 Bom , 255

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of April, 1909, she made a gift of the entire estate to the sole surviving daughter Musammat Ram Kali Kunwar. Musammat Ram Kali obtained possession, and, after her death, the estate has been taken possession of by her two sons, the respondents. The original plaintiff Jai Mangal Singh, now represented by his sons, was the son of another daughter of Rameshar Singh who was dead at the time of the gift to Musammat Ram Kali. The succession having opened on the death of the latter, he claims his one-third share in the property as reversioner jointly with the defendants. His claim was decreed by the trial court, which found that the deed in favour of Musammat Ram Kali operated as an acceleration and that, on her death, the plaintiffs and the defendants were jointly entitled. The deed was attacked in both the courts below on three grounds:

(1) That Musammat Parbati Kunwar was alive at the time of the gift.

(2) That the entire property was not included in the deed of gift.

(3) That the deed contained a provision for the maintenance of Musammat Sumera

The trial Judge rejected all three objections. The learned District Judge agreed with him on the first two points but held that the provision for maintenance vitiated the deed and that, Musammat Sumera being still alive, the succession would only open on her death. It may be noted here that it has never been contended that the provision for maintenance was in any way excessive. The argument is that the mere fact of a provision for maintenance being made operates to prevent there being a surrender of the entire estate and *ipso facto* invalidates the deed.

The matter appears to us to be settled by two recent decisions of the Privy Council. The principle that an acceleration to be valid must be of the entire estate was laid down by their Lordships of the Privy Council in *Rangasami Gounden* v. *Nachiappa Gounden* (1). The lower court, following a decision of the Bombay High Court, has held that any provision for maintenance is inconsistent with this principle. The Privy Council has, however, itself laid down that this is not the case. In *Bhagwat Koer* v. *Dhanukdhari Prashad Singh* (2), an agreement by the widow renouncing the estate and accepting maintenance for her life was held to operate as a valid surrender and to come within the rule laid down in *Rangasami's* case.

(1) (1918) I. L. R., 42 Mad., 623.
(2) (1919) L. R., 46 I. A., 250; I. L. R., 47 Calc., 466.

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The same view was taken in the case of *Sureshwar Misser* v. *Maheshrani Misrain* (1), where the widow surrendered the estate to the next reversioner, but the reversioner at the same time conveyed a small portion of it back to the widow as a provision for her maintenance. The former decision was relied on by the Madras High Court in the Full Bench ruling in *Angamuthu Chetti* v *Varatharajulu Chetti* (2), in which they also have held that a reasonable provision for the widow's maintenance does not affect the validity of a surrender by her of her husband's estate to the nearest reversioner. Even apart from authority, this is, we think, a reasonable view to take. The widow, so long as she is alive, is entitled to be fed and clothed, and some provision for her support must be made by the persons in possession of the estate The matter appears to us to be concluded by the Privy Council rulings to which we have already referred We accordingly allow the appeal, set aside the decree of the lower appellate court and restore that of the trial court with costs throughout.

Appeal allowed.

Before Mr Justice Ryves and Mr Justice Daniels

1923

May, 8

JHARI KOERI (PLAINTIFF) *v.* BIJAI SINGH AND ANOTHER (DEFENDANTS) AND MANGRU-KOERI AND OTHERS (PLAINTIFFS) *

Hindu Law—Hindu widow—Tenancy in possession of widow sold in execution of a decree for rent—Title of auction-purchaser as against remote reversioners of husband

A Hindu widow was in possession as such of a fixed-rate holding, part of the estate of her husband The holding was sold in execution of a decree for arrears of rent in respect of another holding inherited from her husband and was purchased by *J*, who obtained possession After the widow's death some remote reversioners to the husband's estate managed to oust *J* and obtained possession of the holding.

Held, on suit by *J* to recover possession, that it was not necessarily the life interest of the widow only which could pass on an execution sale for arrears of rent against her, and as what purported to be sold under the decree was the entire tenure, *J's* title was good as against all the world except the immediate reversionary heirs, and that *J* was therefore entitled to recover possession *Sitaram* v *Khandu* (3) and *Maharaja Kesho Prasad Singh* v *Chandrika Prasad Singh* (4), referred to

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Hanbans Sahai*, for the appellant.

Maulvi *Iqbal Ahmad*, for the respondents.

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* Second Appeal No. 453 of 1922, from a decree of A. G. P. Pullan, District Judge of Benares, dated the 24th of November, 1921, reversing a decree of Raja Ram, Additional Subordinate Judge of Jaunpur, dated the 30th of July, 1921

(1) (1920) L. R., 47 I. A., 233; I. L. R., 48 Calc., 160
(2) (1919) I. L. R., 42 Mad., 854
(3) (1920) I. L. R., 45 Bom., 105
(4) (1922) I. L. R., 2 Patna, 217.

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JHARI KOERI v. JAI SINGH.

RYVES and DANIELS, JJ.:—Jhari Koeri, the plaintiff appellant in this case, is the auction-purchaser of a fixed-rate holding. The holding originally belonged to one Babu Lal and was inherited by his wife Musammat Chaurasi. Musammat Chaurasi was in possession of another holding, either a fixed-rate or occupancy holding, probably the latter, which she had also inherited from her husband. A decree for arrears of rent against this latter holding was obtained against her. Instead of taking ejectment proceedings under sections 57 (*a*) and 61 of the Tenancy Act, the landholder put to sale the fixed-rate holding now in dispute, which was already mortgaged to him, and it was purchased by the plaintiff under two sale certificates, dated the 21st of June, 1909, and the 24th of November, 1910. The plaintiff obtained possession of the holding. Musammat Chaurasi died about two years before the suit, and on her death the defendants, who are remote reversioners of Babu Lal, managed to get possession of the holding, thereby ousting the plaintiff. The defendants set up title to the holding on the strength of having obtained a relinquishment from a son of one of the daughters of Babu Lal. As it appears that there were daughters of Babu Lal in existence who were nearer heirs, the defendants' title is not assisted by this relinquishment, and both courts have found that they have no title. The courts have differed as to whether the plaintiff is entitled to recover possession from them. The main point in dispute was whether the plaintiff purchased merely the life interest of Musammat Chaurasi. The trial court held that in either case the plaintiff's title was good against all the world except the immediate reversionary heirs, and the defendants having no title, the plaintiff was entitled to get back possession. The lower appellate court considered that as the decree for arrears of rent was passed against Musammat Chaurasi, the plaintiff's purchase could only be of her life interest. It further held that as the defendants were in possession, it did not matter whether they had a good title or not, unless the plaintiff could prove that he purchased the entire interest in the holding. Being of opinion that the plaintiff's purchase was of Musammat Chaurasi's life interest only, the learned Judge allowed the appeal and dismissed the suit.

The question, therefore, for decision in this appeal is what was the nature of the interest which the plaintiff obtained by his auction-purchase in 1909-10 and whether he has a subsisting interest sufficient to entitle him to recover the property

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from the defendants who are in possession without any right whatever

It was laid down by the Privy Council in the case of *Jugul Kishore* v. *Jotendro Mohun Tagore* (1) that whether the whole estate or only the right, title and interest of the widow passes on an execution sale against the widow depends on the nature of the suit If the suit is a personal claim against the widow only, her interest passes, but if the suit is in respect of the family estate or upon a cause not merely personal against her then the whole inheritance passes by the execution sale. The decree in that particular case was for mesne profits. It is contended before us that a decree for arrears of rent must necessarily be personal, whether the holding was ancestral or not, and two cases are cited in support of the argument. The first is the decision in *Jiban Krishna Roy* v *Brojo Lal Sen* (2) The decision in that case was that in that particular case a sale in execution of a decree for arrears of rent passed against a Hindu daughter passed only her interest, but the decision was based on the circumstances of the case and the provisions of section 64 of the Bengal Tenancy Act and is no authority for the proposition that a decree for arrears of rent must necessarily in all cases be treated as a personal liability. The second case is a decision of the Calcutta High Court in *Kristo Govind Majumdar* v. *Hem Chandar Chowdhry* (3), which laid down that a decree for arrears of rent against a daughter in possession was a personal decree, in execution of which only her life interest could be sold. No reasons are given for the decision The Court considered the case concluded by the Privy Council ruling in *Banun Doobey* v *Brij Bhookun Lall Awusti* (4)

An examination of this ruling does not support the conclusion which the learned Judges drew from it. The case was decided on the ground that the sale which was held did not purport to be anything more than of the widow's interest, and the earlier cases cited by their Lordships in their judgment sufficiently show that it is possible for a sale under a rent decree against a widow to pass the entire estate

There has been no finding by the courts below as to whether the holding in respect of which the decree was obtained was a fixed-rate or an occupancy holding In either case the

(1) (1884) I. L. R., 10 Calc., 985
(2) (1903) I L R., 30 Calc., 550
(3) (1889) I L R., 16 Calc., 511

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zamindar might, under section 57 (a) of the Tenancy Act, have enforced it by proceeding in execution, and had he done so, the entire tenure would have been lost to the family. The difference between the two is that if the holding was an occupancy holding, the reversioners could not, in any case, have succeeded to it on Mussumat Chaturasi's death unless they shared in the cultivation during her life-time. It appears to us, however, that it is unnecessary to enter into this question for this reason that it is clear from the record that what purported to be sold under the decree was the entire tenure. If it be assumed that the decretal debt was not of a nature to support a sale of the entire interest, the purchasers obtained a title voidable at the instance of the reversioners on the widow's death. Until avoided by them, it is a good title and cannot be treated as a nullity by any trespasser who has succeeded in getting possession of the property. On this point we agree with the learned trial Judge.

If authority is necessary we may refer to two recent decisions of the Bombay and Bihar High Courts respectively, *Sitaram* v. *Khanda* (1) and *Maharaja Kesho Prasad Singh* v. *Chandrika Prasad Singh* (2). In this respect an execution sale against a widow which purports to pass the entire estate stands on the same footing as a voluntary alienation by her. In this view we set aside the decree of the court below and restore that of the trial court with costs in all courts.

Appeal allowed.

REVISIONAL CRIMINAL.

1923

May, 9.

Before Mr. Justice Daniels.

EMPEROR v. ABDUS SAMAD KHAN.*

Act No. XIII of 1859 (Workman's Breach of Contract Act), section 2B—Frivolous or vexatious complaint—Compensation—Notice to show cause a condition precedent to the making of an order for compensation.

Before an order for compensation in respect of a frivolous or vexatious complaint can be made under section 2B of Act No. XIII of 1859 as amended by Act No. XII of 1920, it is a condition precedent that notice should be issued to the person against whom the order is proposed to be made, to show cause against the order.

THIS was a reference made by the Sessions Judge of Benares in a case under the Workman's Breach of Contract

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(Amendment) Act, 1920. The facts of the case are stated in the following order —

"This is an application for revision of an order passed by Babu Shri Krishan Kumar Sahib, Magistrate, first class, in a case under Act No XIII of 1859, as amended by Act No XII of 1920. The applicant made a complaint against Ram Nandan under section 2 of that Act on the ground that Ram Nandan had received an advance of Rs 70 and had abandoned his work without repaying the advance The learned Magistrate held that the contract was that Rs 4-5-0 of the advance of Rs. 70 should be paid to Ram Nandan, and that the balance should be paid to Narotam Sahu to whom Ram Nandan already owed Rs 65-11-0 No money was paid to Narotam Sahu, and accordingly Ram Nandan ceased to work for the applicant. On these facts the learned Magistrate found that the charge made was vexatious and accordingly ordered that the applicant should pay Rs 20 as compensation

The facts as found by the learned M[illegible] are not in dispute before me It is, however, urged that the provisions of section 2B of the Act have not been complied with This section provides that in cases where the Magistrate considers the complaint to have been frivolous or vexatious, he should call upon the complainant to show cause why an order for compensation should not be passed against him If after having considered such explanation he considers that compensation should be awarded to the defendant the Magistrate is to make an order awarding compensation, and to give his reasons therefor

In the present case it is clear that this procedure has not been followed The order for compensation is an integral part of the judgment, and it seems clear from the record that the first intimation which the complainant had was the order directing that compensation should be paid Nor are any definite reasons given for making this order, although it is true that a perusal of the judgment as a whole clearly shows the reasons which must have led the learned Magistrate to his decision. It is clear that the order complained against, being made without the complainant having had an opportunity of objecting, and not being accompanied by a clear statement of the reasons which induced the Magistrate to make the order, is illegal Accordingly under section 438 of the Code of Criminal Procedure, I send the record to the Hon'ble High Court for orders, with a recommendation that the order directing the payment of Rs 20 compensation be quashed"

The parties were not represented.

DANIELS, J. :—This is a reference by the learned Sessions Judge of Benares in a case under the Workman's Breach of Contract Act, 1859, as amended by Act XII of 1920. It is admitted that the Magistrate omitted, before ordering the complainant to pay compensation under section 2B of the Act, to call on him to show cause. I accordingly set aside the order of compensation passed and direct the Magistrate to do now what he should have done in the first instance, namely to call upon the complainant to show cause why he should not be ordered to pay compensation The Magistrate will then pass final orders after considering any cause that may have been shown. The amount of compensation, if already deposited, will remain [illegible] pending the decision of the case.

APPELLATE CIVIL.

1923
May, 9.

Before Mr. Justice Lindsay and Mr. Justice Sulaiman.

RAM CHARAN LAL (PLAINTIFF) v. RAGHUBIR SINGH AND OTHERS (DEFENDANTS).*

Civil Procedure Code, order IX, rule 13; order XVII, rule 2—Procedure—Ex parte decree. Application to set aside decree passed ex parte—When a decree may be considered to be an ex parte decree.

In a suit for the recovery of possession of immovable property against several defendants a written statement was filed by all of them, but on the date when the case came on for hearing only one of the defendants was present. He asked for an adjournment, but, as he did not comply with the condition upon which an adjournment was offered, no order was made. The pleader for the defendants was also present, but stated that he had no instructions. Thereupon the court took what evidence had been produced by the plaintiff (the defendants had produced none) and decided the case on it in favour of the plaintiff. One of the defendants, who had not been present at the hearing, then applied to have the decree set aside as if it was an *ex parte* decree. The application was allowed: the decree was set aside, and on a rehearing a decree was passed in favour of the defendants.

Held on appeal by the plaintiff that it must be deemed that the lower court was, under order XVII, rule 2, of the Code of Civil Procedure, in reality acting in the mode prescribed by order IX of the Code, and that the original judgment and decree should be taken as *ex parte* proceedings. The defendant was therefore entitled to apply under rule 13 of order IX to have the *ex parte* decree set aside. *Phul Kuar* v. *Hushmut-ullah Khan* (1) and *Emdt-ullah Basunia* v. *Jiban Mohan Roy* (2), referred to.

THE facts of this case are fully stated in the judgment of the Court.

Mr. *Nihal Chand*, for the appellant.

The respondents were not represented.

LINDSAY and SULAIMAN, JJ.:—This is a plaintiff's appeal arising out of a suit for possession of certain property.

It appears that the property in question was sold by Musammat Reoti Kunwar, on the 29th of November, 1916, to one Chandan Singh. The case for the plaintiff was that Musammat Reoti Kunwar had no authority to sell this property as she had only the estate of a Hindu widow.

Chandan Singh is dead and is represented on the record by his sons and grandsons.

The defence put up to the suit was that Musammat Reoti Kunwar was full owner of the property under a will executed by her husband in her favour.

We have to deal, in the first instance, with the history of the suit in the trial court.

* First Appeal No. 113 of 1921, from a decree of Muhammad Ziaul Hasan, Additional Subordinate Judge of Mainpuri, dated the 23rd of December, 1920.

(1) (1916) I. L. R., 37 All., 460.

It seems quite clear that after the plaint had been filed summonses were issued to the defendants and a date was fixed for the first hearing and for framing of issues.

It is not disputed that the defendants all combined to file a written statement embodying the defence to which we have just alluded Issues were framed and a date was fixed some months ahead for final disposal of the case, the parties being directed to have their evidence in court upon the date so appointed.

The case came up before the Additional Subordinate Judge on the 3rd of September, 1920. On that date one of the defendants Raghubir Singh (defendant No. 1) was present in court. The pleader who appeared for the defendants was also present. He informed the court that he had no instructions to defend the case. Raghubir Singh asked the court to adjourn the case for certain reasons and the court made an order that if Raghubir Singh would deposit a sum of Rs. 100 in two hours, an adjournment would be allowed This order was not complied with by the defendant Raghubir Singh.

The defendant Dambar Singh, who is defendant No. 4, was absent on this date

What happened then was this. The Subordinate Judge took the evidence which had been produced by the plaintiff and as there was no evidence on behalf of the defendant, he disposed of the case at once, coming to findings upon all the issues which had been framed. The result of his proceedings was that he gave the plaintiff a decree for possession and for mesne profits.

After this decree had been passed Dambar Singh, who was absent on the date on which the suit was decided, appeared before the successor in office of the Subordinate Judge who had decided the case, and made an application to have the decree set aside, the application being treated as one under order IX, rule 13.

Dambar Singh supported his application by an affidavit alleging that on the date in question he had been ill and unable to attend the court and to enforce the presence of his witnesses.

Notice having been issued to the plaintiff, the latter filed a counter affidavit. The Subordinate Judge, after considering the affidavits tendered by both parties, came to the conclusion that the former decree should be set aside and exercised his power for that purpose After the decree had been set aside, certain evidence which was put forward by the defendants was

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received on the record and the result was that the second judgment was passed in favour of the defendants. The final judgment dismissed the plaintiff's suit with costs to the defendants. The plaintiff now appeals and the first point which has been raised on his behalf is that the court below was not competent to set aside the earlier decree under the provisions of order IX, rule 13.

We have, in the first place, to consider what was the state of affairs when the Subordinate Judge passed his judgment on the 3rd of September, 1920.

It seems clear from what has already been set out that on that date he had before him a case which fell within the purview of order XVII, rule 2.

We think it is right to say that there can, strictly speaking, be no *ex parte* proceedings against any defendant who has entered an appearance and filed a defence. That, to our mind, is clear from the provisions of order IX. Order XVII, rule 2, applies to the particular case where the hearing of the suit had been adjourned and where, on the adjourned date, the parties or any of them fail to appear.

In that case order XVII, rule 2, enables the court, if it so chooses, to deal with the case as being one under order IX or to make such other order as it thinks fit.

It has to be considered here that there is nothing in the judgment of the 3rd of September, 1920, to indicate that the Additional Subordinate Judge was dealing with the case under order IX. No mention of the provisions of order XVII, rule 2, or of order IX is made in the judgment, and the contention, therefore, is that the decision was really a decision on the merits and that the decree which was based upon this judgment could not be set aside by an application made under order IX, rule 13.

There has been a great deal of conflict of judicial decisions regarding the interpretation of the provisions of orders IX and XVII. We have, however, to notice a decision of a Bench of this Court which is reported in *Phul Kuar* v. *Hashmat-ullah Khan* (1). It was there held that on the proper interpretation of order XVII, rule 2, a court cannot pass a judgment on the merits under cover of the words "make such other order as it thinks fit." The learned Judges of the Court were of opinion that the "other order" here referred to could only mean an order for further adjournment.

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In the present case no order for further adjournment was made and a judgment was in fact delivered, and it seems to us, therefore, that under the view of law taken by the learned Judges of this Court, it must be deemed that the Additional Subordinate Judge was in reality taking action under order IX and that his judgment and decree should be treated as *ex parte* proceedings. If that is so, then there can be no doubt that Dambar Singh was entitled to apply to the court under order IX, rule 13, to have this *ex parte* decree set aside We agree with the view of law which was taken by a Bench of the Calcutta High Court in *Enat-ullah Basunya* v *Jiban Mohan Roy* (1). [Their Lordships then discussed the merits of the case and dismissed the appeal, but without costs as the respondents were not represented]

Appeal dismissed.

REVISIONAL CIVIL.

Before Mr Justice Walsh and Mr. Justice Kanhaiya Lal

1923

May, 10.

JARBANDHAN (DEFENDANT) v BADRI NARAIN (PLAINTIFF) AND MUSAMMAT RAM RATI (DEFENDANT).*

Act No IX of 1872 (Indian Contract Act), section 24—Illegal contract—Money bond with covenant for the mortgaging of the cultivatory holding of the borrower

Defendant borrowed money from plaintiff's father and executed a bond agreeing to repay it on a certain date There was a further condition that if the money was not repaid on that date, the creditor could enter into possession of the defendant's cultivatory holding as a usufructuary mortgagee

Held that the whole contract was not illegal and the plaintiff was entitled to a simple money decree, notwithstanding the invalidity of the condition *Mohammad Shakur* v *Gop[illegible]*), [illegible] to

THIS was an application for revision of a judgment of a Court of Small Causes giving the plaintiff a simple money decree and holding that the bond sued upon was not void by reason of a condition therein which allowed the plaintiff in default of payment to take possession as mortgagee of the debtor's cultivatory holding.

The judgment of the Small Cause Court was as follows :—

" *1st issue* —The bonds in suit were executed in favour of the plaintiff's deceased father The plaintiff is the surviving member of the family, so I find that he has a right to sue

* Civil Revision No 30 of 1923

(1) (1914) I. L. R., 41 Calc., 956

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JARBANDHAN v. BADRI NARAIN.

2nd issue.—The sworn statements of Badri Narain prove the execution of the bonds in suit for consideration. The interested statement of Jarbandhan is worthless. Sheo Kumar was not present till the execution of the bonds was completed. His evasive answer as to whether the plaintiff's relation has complained against him shows that he has reason to depose against the plaintiff, so he is also not worthy of credit. I find this issue for the plaintiff.

3rd issue.—The decision in the case of *Mohammad Shakur* v. *Gopi* (1) is on facts similar to this case. The learned pleader for the defendant relies on the decisions in Allahabad Law Journal, Vol. 20, page 316, and Indian Cases, Vol. 18, page 9, but in these cases the suit was based on a covenant to indemnify; in the beginning the deed was a mortgage and the mortgage had come into existence. Here the mortgage was to come into existence on the breach of personal covenant but it could not come into existence because the bonds were not registered. Therefore the decisions cited on behalf of the defendants have no bearing, and on the authority of the case of *Mohammad Shakur* v. *Gopi* (1) cited above I find that the personal covenant in the deeds in suit is not void.

Ordered:

That the claim be decreed with costs and future interest at 6 per cent. per annum."

On the case being laid before a single Judge it was referred to a Bench by the following order:—

"This revision raises a question of some importance which is likely to recur. The defendant borrowed money from the plaintiff's father and executed a bond agreeing to repay it on a certain date. There was a further condition that if the money was not repaid on that date the creditor could enter into possession of the defendant's cultivatory holding as a usufructuary mortgagee. It is admitted that this latter covenant was contrary to the provisions of the Usurious Act and illegal. The plaintiff sued for a simple money decree for the amount advanced by him. The defence was that the whole contract was illegal within the meaning of section 23 of the Contract Act, and that the plaintiff could not get decree. Two decisions of this Court were cited before the learned Judge of the Small Cause Court. Neither of them has been reported except in the Indian Cases. One of the rulings is in favour of the plaintiff, the other in favour of the defendants. Under these circumstances it seems desirable that the question of law involved should be decided by a Bench, and I direct that this application be laid before a Bench."

Pandit *S. S. Shastry*, for the applicant.

Munshi *Kunuda Prasad*, for the opposite parties.

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JALESHWAR v. ATHAR AMAN.

WALSH and KANHAIYA LAL, JJ.:—We are both satisfied with the judgment of the Small Cause Court Judge, which is an admirable one, and the case is really covered by the decision of the late Sir SUNDAR LAL in the case of *Mohammad Shakur* v. *Gopi* (1) which the learned Judge has followed. The application is dismissed with costs

Application dismissed.

APPELLATE CIVIL.

Before Mr. Justice Ryves and Mr. Justice Daniels.

1923

May, 14.

BHAGELU (PLAINTIFF) v. DHARMA AND OTHERS (DEFENDANTS).*

Guardian ad litem—*Powers of guardian*—*Appointment, subsisting for the whole of the litigation in respect of which it is made.*

Where a guardian *ad litem* to a minor defendant has once been appointed, such appointment continues for the whole of the suit until it is revoked by court, and the guardian so appointed is the only person who can file an appeal on behalf of the minor. *Shambhu* v. *Kashi* (2) followed.

THE facts of this case sufficiently appear from the judgment of the Court

Munshi *Jang Bahadur Lal* and Munshi *Shiva Prasad Sinha*, for the appellant

Babu *Piari Lal Banerji*, for the respondent

RYVES and DANIELS, JJ.: The facts out of which this appeal arises are as follows: Bhagelu brought a suit against Musammat Dharma for restitution of conjugal rights, and, as Musammat Dharma was a minor, her uncle Sampat was made guardian *ad litem*. The trial court decreed the suit. An appeal was filed in the lower appellate court on behalf of the minor by the minor's father Manbodh. There had been no order removing Sampat from guardianship. The lower appellate court commented on the fact that Sampat had been appointed guardian *ad litem* in the lower court, the appeal had been filed through Manbodh. In the result the court allowed the appeal and dismissed the suit

On appeal before us it has been urged that there was no valid appeal before the lower appellate court, and our attention was called to the recent decision of a Bench of this Court in *Shambhu* v. *Kashi* (2) which is exactly in point. It was there held that where a guardian *ad litem* to a minor defendant

* Second Appeal No. 1731 of 1921, from a decree of Rao T. L. Additional Subordinate Judge of Etah, dated the 30th of May, 1921, reversing a decree of Lakshmi Narain Tandon, Munsif of Etah, dated the 21st of December, 1920.

(1) (1916) 35 Indian Cases, 203.

(2) (1922) I. L. R., 44 All., 619.

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has once been appointed, such appointment continues for the whole of the *lis* or until it is revoked by court, and the guardian so appointed is the only person who can file an appeal on behalf of the minor. That decision follows several other decisions of this Court which are mentioned in the course of the judgment, and also a Madras case. It seems to us that we are bound to follow this course of decisions. It may be that the defendant has a remedy open to her as suggested in the case of *Bawan Das* v. *Bishnath* (1). We allow the appeal, following the decisions of this Court, and setting aside the decree of the court below restore that of the first court. We make no order as to costs.

Appeal allowed.

1923
March 14

Before Sir Grimwood Mears, Knight, Chief Justice and Mr. Justice Piggott.

GAURI SHANKAR AND OTHERS (DEFENDANTS) v. MUSAMMAT MANKI KUNWAR (PLAINTIFF).*

Civil Procedure Code, order VI, rule 4; Power of trial courts as to the regulation of pleadings—Calling for further particulars—Costs.

It is the duty of the trial Judge to see that in all cases the parties plead their cases so precisely, fully and clearly that each side knows the nature of the case which it has to be met, and this rule is one of general application.

The trial Judge should, when ordering further particulars of a claim or statement of defence to be given, order the party in default to pay a specified sum of costs to the other side for the costs occasioned by the application; such payment to be made on or before the delivery of the particulars. If the order is not obeyed and the plaintiff is in default, he should have his action stayed, and if the defendant is in default, his defence should be struck out.

Particulars having been furnished, the Judge should be careful at the trial to exclude all evidence which is not fairly covered by the original paragraph and the particulars, and should give that as his reason.

THE facts of this case are fully stated in the judgment of the Court.

Dr. *Surendra Nath Sen*, Munshi *Damodar Das*, Dr. *Kailas Nath Katju*, Munshi *Kunnuda Prasad* and Munshi *Badri Narain*, for the appellant.

Mr. *B. E. O'Conor*, Maulvi *Mukhtar Ahmad* and Munshi *Narain Prasad Ashthana*, for the respondent.

MEARS, C. J. and PIGGOTT, J.:—In the lower court this was a suit for specific performance of a contract for sale embodied in a document, dated the 2nd of December, 1918. That

* First Appeal No. 49 of 1921, from a decree of Suraj Narain Majju, Additional Subordinate Judge of Benares, dated the 20th of December, 1920.

(1) Weekly Notes, 1899, p. 203.

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document set forth that a dispute had arisen between Musammat Manki Kunwar and the defendant and other parties in like interest in relation to about 17 acres of land in mauza Lachipur. That land had been bought by Gauri Shankar a few years before. That land was the subject of a pre-emption suit brought by the present plaintiff, which at the date of this agreement of the 2nd of December, 1918, had been through two courts, and in each court had been decided adversely to the lady. At the date of this agreement there was an appeal pending in the High Court. With a view to put an end to the dispute relating to this land in mauza Lachipur, and also with a view to put an end to a rivalry between the parties with regard to certain land under the control of the Maharaja of Benares, they entered into the agreement in suit. In substance, in certain events the lady had to pay Rs. 5,000 in order to become the owner of the land in mauza Lachipur, and as regards the other property, mauza Sakhanpur and other mauzas, set out in the plaint, the parties were willing to become partners in that property, and partner on the basis of each taking a half. It appears that there were various persons who wished to acquire this property, and a man whose name is of no importance in the action, first offered a certain amount of *nazrana*. The lady capped that by what became ultimately an offer of Rs. 10,000 and thereupon the defendant and his party added to it Rs. 1,000, making the offer Rs. 11,000. In this state of affairs the court of His Highness the Maharaja of Benares looked into the matter, and by the 2nd of December all the parties to this suit had become aware of the inadvisability of bidding against each other, and indeed, on the 4th of January, 1919, they made it perfectly clear to the officers of His Highness that Rs. 11,000 would be paid as to Rs. 5,500 by the lady, and as to Rs. 5,500 by Gauri Shankar and his father, and they would be content each to receive one half of the property. That is in fact what has happened.

The complaint of the present plaintiff was that in breach of the definite agreement the defendants had refused to convey to her the Lachipur property, for the Rs. 5,000 set out in the agreement. The defendant, searching about for a defence, thought that some vague allegations of fraud would help him and embodied them in para. 9 of 1. The plaintiff did not apply for particulars of the fraud and the learned Subordinate Judge, in entire disregard of the provisions of order VI of the Code of Civil Procedure, proceeded to frame issues

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The one relating to fraud was remarkable. It runs as follows:—Issue 1 (c). "Were there any allegations in connection with the pre-emption second appeal made with intense deception which affected the defendants as alleged in paragraph No. 4 of the written statement? If so, how does that fact affect the claim?"

It was the duty of the pleader for the plaintiff to apply to the Subordinate Judge to order the defendant to deliver further and better particulars of the charge of fraud. He did not do so. When settling issues it was the duty of the Judge himself to require the defendant to specify with particularity the nature of the fraud alleged. He should have done this in the interest of the plaintiff and because the rules require it and in the public interest. If Subordinate Judges would make the parties comply with reasonable strictness with the provisions of order VI, cases would be more satisfactorily decided and a very large amount of public time would be saved in their disposal, with a corresponding benefit to litigants.

Taking the case of fraud as an illustration, the proper form of application in an ordinary suit where the plaintiff has alleged fraud vaguely would be somewhat as follows:—"That the plaintiff be ordered within 10 days to deliver to the defendant further and better particulars of the fraud alleged in paragraph . . . of the plaint, stating whether the representations alleged were verbal or in writing; if in writing, identifying it, and producing the document or documents for inspection; if verbal, giving the substance of each and every of the said representations and stating, as regards each one, the date when and the place where and the person by whom and the person to whom the said representation was made, and that the plaintiff be precluded at the trial from giving any evidence of any representations other than those (if any) clearly pleaded in particulars in . . . and the particulars to be delivered, and that the plaintiff be ordered to pay Rs. . . . to the defendant as the costs of and occasioned by this application, such payment to be made with the delivery of the particulars to be ordered."

Subordinate Judges should be watchful to see that in all cases the parties have pleaded their cases so plainly, fully and clearly that each side knows the nature of the case which has to be met, and this rule is one of general application. Frequently the result of ordering particulars of nebulous claims and defences will be to make it manifest that the claim or defence has no substance.

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A Subordinate Judge should, when ordering particulars to be given, order the party in default to pay a specified sum of costs to the other side for the costs occasioned by the application; such payment to be made on or before the delivery of the particulars. If the order is disobeyed, and the plaintiff is in default, he should have his action stayed; and if the defendant is in default, his defence should be struck out.

Particulars having been furnished, the Judge should be careful at the trial to exclude all evidence which is not fairly covered by the original paragraph and the particulars, and should give that as his reason.

Unless pleadings are definite a Judge is entirely at the mercy of the parties and has a difficulty in excluding evidence however irrelevant. The case is protracted and the opposite party not infrequently put in an unfair position. A defendant is entitled, before delivering his written statement, to have an order that the plaintiff shall deliver to him a pleading in compliance with order VI. Equally, a plaintiff is entitled, before being called to take any further step in the action, to have proper particulars of the defendant's written statement. If the Judge is of opinion that a groundless application is made to him, the party putting in the application should likewise be ordered to pay costs.

We have made these observations at length because we are persuaded that, without undue strictness or pedantry, every Subordinate Judge could effect a large saving of public time by requiring reasonable compliance with the existing rules, and we think that Subordinate Judges should entertain applications by the parties if made within a few days of the receipt by them of the plaint and written statement, respectively. Pleadings at present are not infrequently deliberately framed in the most general of terms and are involved, unsystematic, argumentative and, indeed, abusive. They should contain clear, definite allegations of fact, with, when occasion demands it, the necessary reference to statutory law.

In the particular case under consideration, if the defendant had been made to specify in clear terms what was the nature of the fraud that he alleged, with the proper particulars which such a plea requires, it would have been found at once that there was no substance in his allegation. It now turns out that if condescended itself into this, that because the lady was all along from first to last that she had a right of pre-

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GAUCHI SHANKAR v. MUSAMMAT MANKI KUNWAR.

emption, therefore she was guilty of deceipt or, to use the curious language of the Subordinate Judge as embodied in issue 1 (c), "intense deception." That is a phrase with which we are wholly unfamiliar. There is no doubt that the lady was alleging a right of pre-emption. It may have been a good claim, it may have been a bad claim. At the very time when the right of pre-emption was being asserted by her in the agreement of the 2nd of December, 1918, matters had reached the stage when two competent courts had decided against her, and this was a fact that was known to the defendants; and yet it is said that the lady made statements as regards her right to pre-emption which were false to her knowledge, were intended to deceive, and in fact did deceive those defendants and caused them damage in that they were induced to enter into the contract. Of course it is not put in that way in the pleadings, because that would have shown there was no substance in the plea. The learned Subordinate Judge, when he got into close quarters with the facts, said that he did not believe the defence allegation that the plaintiff got the agreement "through deceptive words." To prove a case of fraud it must be proved that representations were made which were false to the knowledge of the party making them or were such that the party making them could have no reasonable belief that they were true, that they were made for the purpose of being acted upon and believed, that they were believed and acted upon and caused the actual damage for which relief is claimed. We can find no possible answer of the defendant to this suit, and we are of opinion that this is one of those cases in which specific performance of the contract must be declared, and that the judge was right. We, therefore, dismiss this appeal with costs.

Appeal dismissed.

Before Mr. Justice Walsh and Mr. Justice Kanhaiya Lal

1923 May, 11.

HAR PRASAD AND ANOTHER (DEFENDANT-DECREE-HOLDERS) v. RAGHUBAR DAYAL (DECREE-HOLDER).*

Arbitration—Award—Uncertainty—Discrepancy between terms of award and map filed therewith—Means of correcting discrepancy—Execution of decree.

If there is on the face of an award a patent inconsistency, such as a flat contradiction in measurement, or a mistake of arithmetical calculation, it is open to the court to which application is made for filing the award, on a patent error of that sort being pointed out, to send the award back to the arbitrators to correct it, before a decree is passed in accordance with it. But anything of this kind cannot be done in execution proceedings.

* First Appeal No. 255 of 1922, from a decree of Jati Sarup, Subordinate Judge of Pilibhit, dated the 5th of April, 1922.

THE facts of this case sufficiently appear from the judgement of the Court.

Mr. *G. W. Dillon*, for the appellants.

Maulvi *Iqbal Ahmad*, for the respondent.

WALSH and KANHAIYA LAL, JJ.:—In this case, in the course of an application in execution to enforce a decree passed in terms of an award, the learned Judge has gone into the merits, and finding on the evidence that a mistake had been made in the demarcation of a dividing line as shown upon a map which became a part of the decree, he has endeavoured to amend the mistake by giving effect to what he considers the real intention of the arbitrators. It is quite clear that no execution court has any jurisdiction to do anything of the kind. It may be that by an unfortunate chapter of accidents the decree-holder has suffered loss by reason of the decree not in fact representing the true intention of the arbitrators, and at first sight it may seem illogical for a court of justice to refuse to remedy a mistake of that kind, but when the matter is carefully considered, it is clear that no such criticism can really be made. The decision of arbitrators is final. If there is on the face of the award a patent incon istency, such as a flat contradiction in measurement, or a mistake of arithmetical calculation, it is open to the court to which application is made for filing the award, on a patent error of that sort being pointed out, to send the award back to the arbitrators to correct it, before a decree is passed in accordance with it. But anything of this kind cannot be done in execution proceedings, and there is, therefore, a preliminary objection to the order of the learned Judge in any case. In this case a description of the dividing line is to be found in the language of the award itself and a further demonstration of the dividing line has been shown upon a map accepted by the arbitrators and made part of the award; therefore, it is extremely doubtful whether a court would have jurisdiction to go into the question whether the line as shown by the map was correct. That would mean really rehearing the arbitration on the merits, so far as this particular point is concerned. The view of the court taking upon itself the decision of such a question as that illustrated in this case by the learned Judge having taken the evidence of what is called the head arbitrator, who says, looking at the map, that he accepted it in a hurry and that, in his opinion, now looking at the terms of the award, the map is incorrect. But,

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whatever his opinion may be to-day, it by no means follows that that opinion so expressed by him, looking at the document afterwards, was the unanimous opinion of the arbitrators, and, therefore, in any case, it would appear that the only course open to a court, under such circumstances, would have been to set aside the award and to send it back to the arbitrators to re-hear and to re-decide the question of this divided opinion. However, it is not really necessary to express a final opinion on that point, because this award, including the map, was filed by the judicial act of a competent court after all the parties had been heard. A decree was passed and the map now in question became a part of the decree. It is quite clear that such a decree, including the map, cannot be altered by the court exercising jurisdiction in execution. The appeal, therefore, must be allowed and the order set aside with costs.

Appeal allowed.

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May, 14.

Before Mr. Justice Walsh and Mr. Justice Kanhaiya Lal.

MUHAMMAD IFTIKHAR-UL-LAH (JUDGMENT-DEBTOR) v. BANKE LAL (DECREE-HOLDER).*

Civil Procedure Code, order XXXIV, rule 10—Mortgage suit—Appeal against preliminary decree—Appeal dismissed with costs—Decree regarding costs not executable until final decree is passed.

On appeal to the High Court from the preliminary decree in a mortgage suit the High Court dismissed the appeal, but awarded the decree-holder for the payment of the mortgage money and also awarded certain costs to the decree-holder respondent. The decree-holder applied for execution of his recovery of the costs so awarded to him by the High Court.

Held that, the decree of the court below having been varied in the case of the High Court, the only way in which the decree-holder could realize the costs decreed to him was by getting a final decree prepared, including therein the costs, and executing that. *Jumna Pasi* v. *Ram Shankar Misra* (1), distinguished.

THE facts of this case are fully stated in the judgment of the Court.

Dr. *Kailas Nath Katju* and Pandit *Madan Mohan Nath Raina*, for the appellant.

Babu *Piari Lal Banerji*, for the respondent.

WALSH and KANHAIYA LAL, JJ.: This appeal arises out of an application made by the decree-holder respondent for the recovery of certain costs, awarded to him by an appellate decree of this Court, from the person of the judgment-debtor. It appears that the decree-holder obtained a preliminary decree

* First Appeal No. 203 of 1922, from a decree of Ganga Nath, Subordinate Judge of Moradabad, dated the 13th of May, 1922.

(1) (1919) I. L. R., 41 All., 479.

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for the sale of certain property against the present judgment-debtors and other persons, which provided that in the case of non-payment of the decretal money, including the costs awarded by the trial court, the mortgaged property was to be sold. From that decree some of the heirs of the original mortgagor appealed to this Court. Their appeal was unsuccessful and was dismissed, excepting in so far that the time for the payment of the money was extended; and the decree-holder respondent was awarded his costs as against them. The effect of the dismissal of the appeal with the modification mentioned above was that the decree of the trial court, as amended, merged in the decree of this Court, and until it was made final it could not be executed against the mortgaged property. The decree-holder sought in the present proceedings to recover the costs awarded to him by the decree of the appellate court, but order XXXIV, rule 10, of the Code of Civil Procedure provides that in finally adjusting the amount to be paid to a mortgagee in case of a foreclosure or sale or redemption, the court *shall*, unless the conduct of the mortgagee has been such as to disentitle him to costs, add to the mortgage money such costs of the suit as have been properly incurred by him since the decree for foreclosure or sale or redemption up to the time of actual payment. It is open to a court of appeal to direct that such costs as it may award against the unsuccessful appellant may be recoverable from him personally, but if there is no such express direction, the costs are, as a matter of ordinary practice sanctioned by order XXXIV, rules 2, 4 and 10, of the Code of Civil Procedure, added to the mortgage money and are, in the first instance, recoverable from the mortgaged property after the decree is made final. That view has been recognized in the cases of *Dunbar Singh* v. *Kalyan Singh* (1) and *Mirza Sadiq Husain Khan* v. *Mussammat Umrao-ul-fatima* (2). The court below has relied on the decision in the case of *Imtiaz Bibi* v. *Ram Shankar* (3), but in that case the decree sought to be executed was a final decree in a mortgage suit, which provided for the extension of the time for payment by the mortgagor for another six months from the date thereof and went on to direct the appellant to pay the respondent a certain sum of money. A final decree stands, however, on a different footing from [illegible]

(1) (1917) I. L. R. [illegible]
(2) (1918) 16 [illegible]
(3) (1919) I. L. R. 41 [illegible]

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decree for sale. A preliminary decree is supposed to direct the taking of accounts of what would be due on the mortgage, including the costs of the suit, in the manner provided by order XXXIV, rules 2, 4 and 10, of the Code of Civil Procedure. A final decree is intended to give the result of the account, as it would stand on the date of that decree, showing the money due on the mortgage, including the costs recoverable from the mortgaged property, and if that final decree contains a separate direction for the payment of costs by a certain party to another, the situation becomes entirely different. In that particular case, the costs in question were the costs of an unsuccessful appeal brought in the High Court by one only of several mortgagors against the final decree. In the present case no final decree has yet been prepared. The preliminary decree merely directed the taking of accounts and the payment of a certain sum of money including costs within a certain period, with a proviso that if the said amount was not so paid, the mortgaged property shall be liable to be sold. That decree merged in the appellate decree of this Court. The latter is the only decree capable of being made final; and the two decrees must be read together in order to determine the rights of the parties and the remedies at present available to them. We do not, at any moment, suggest that the right of the decree-holder to recover the costs from the person of the then unsuccessful appellants is altogether excluded. The remedy of the decree-holder at the present stage is to get a final decree prepared, showing the money due on the mortgage inclusive of the costs of the suit and the costs incurred subsequent to the preliminary decree for sale, and when such a decree has been obtained, he can execute the decree against the mortgaged property, and then pursue such remedy as may be available to him, after the mortgaged property has been sold, for the recovery of the rest of the money due to him on account of the decree. In that view of the matter this appeal must be allowed and the order of the court below set aside, the result being that the application of the decree-holder will stand dismissed with costs here and hitherto.

Appeal allowed.

APPELLATE CRIMINAL.

Before Mr. Justice Walsh and Mr. Justice Kanhaiya Lal.

EMPEROR *v.* TARA AND OTHERS.*

Act No. I of 1872 (Indian Evidence Act), section 24 (confession by accused induced to confess by prospect of obtaining a pardon), Criminal Procedure Code, section 164—Admissibility of evidence.

It is not legal to use, either as against the person making it or as against his co-accused, a confession which is the direct outcome of the confessing accused being given to understand that, if he confessed, there was a reasonable prospect of his receiving a pardon.

But where, after making such a confession, the accused makes a statement under section 364 of the Code of Criminal Procedure, in which, after stating that he has now no hope of obtaining a pardon, he retracts the confession previously made, such statement may be used, certainly as against the person making it, and possibly against his co-accused also. *Emperor v. Khetal Gir*, referred to.

Mr. *G. W. Dillon*, for the appellants.

The Assistant Government Advocate, Mr. *H. Wakefield*, for the Crown.

THE facts of this case are fully stated in the judgment of WALSH, J.

WALSH, J.: This is a very difficult case which has given us a great deal of trouble, and the result of which probably involves a miscarriage of justice, but, speaking for myself, I have no doubt whatever as to the legal principles applicable to it, and as to the applicability of them to the peculiar circumstances of the various appellants before us. Now there are three cases, each of them involving a large number of alleged dacoits who were tried together for participation in three separate dacoities, committed at different times and at different places, but round about the same season and round about the same neighbourhood. Their connection arose more from the alleged co-operation of a large number of the gang of as in each of them, than from any other circumstance, but no direct connection between the three dacoities. There were really four in all, and I decide to say at once, because I shall have something to say hereafter by way of criticism, that the police and the Sessions Judge were alike confronted with a difficult task.

We are dealing today with one only of these dacoities, namely, that committed at Sarai Chabila, on the night between the 23rd and 24th of July, at the house of one Bate Ram and others in the same compound. The other appeals relate to

* Criminal Appeal No. 81 of 1923, from an order of D. C. Beevor, Sessions Judge of Fatehpur-Sikri, dated the 22nd of December, 1922.

(1) (1923) I. L. R., 45 All., 200.

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dacoities committed on the 9th of March of the same year, 1922, and on the 28th of June, 1922. The fourth dacoity, which the Judge says was thought by the investigating officer to be closely connected with this dacoity by reason of its being carried out by the same participants, occurred on the 20th of July.

We have not heard the other appeals, but we are told by the Assistant Government Advocate that in substance, and in respect of the characteristics which have evoked our criticisms of the judgment in this case, the other two appeals, which are still pending, do not greatly differ from this, and, therefore, although this decision does not govern the others, this case, on the other hand, must be considered to be a type of the others, and the result in the others when we reach them must be governed by the principles which we propose to lay down in this, and the criticisms which we propose to pass upon the procedure unfortunately adopted in this case must be read with reference to the other cases *mutatis mutandis*.

It cannot be denied that the general characteristics in this case, at any rate,—and we are told both by the counsel for the defence and by the Assistant Government Advocate that the same characteristics apply to the other appeals,—resemble more a gang case, in which the evidence obtained by the police, mainly through approvers, of association and active participation in planning and preparation and so forth, is applicable to a class of persons varying in number who have set out to commit a series of joint crimes. The learned Judge himself, as shown by his judgment, experienced considerable difficulty in avoiding reference to the other cases from time to time, and he also from time to time utilized to a quite considerable extent material which he had got, either from the police evidence, or from what seems not at all improbable also police diaries, tending to throw suspicion and afford clues which were entertained by the police generally against particular individuals before they got any definite information with regard to the commission of this or the other of the dacoities which I have mentioned. Another characteristic is that there is a total absence, very unusual in a case where so many convictions have been secured in the commission of a particular dacoity in a particular village, of any attempt to obtain identification by villagers or the complainants or their households, and none of them have been called to give evidence.

Another exceptional characteristic is that, with the exception of an absconding accused to whom we shall have to refer again, no loot has been traced, and as against the 17 appellants who have been convicted, there is no evidence of any loot found in their possession.

We now come to the peculiar and embarrassing features of this case. One of the appellants is a man named Kishan. Somehow, it does not matter how, the police got his name and came into touch with him. He immediately informed them that he was ready to give information. He admitted this of course is in the nature of a confession which is rendered inadmissible by law and it really ought not to have appeared upon the evidence at all) participation in the dacoities into which the police were inquiring, and he plainly intimated to the police that he was willing to tell them what he knew, for a consideration. Eventually he was put up under section 164 of the Code of Criminal Procedure. He made an elaborate statement under that section amounting to a confession. He was put upon his trial and has been convicted and that confession has been used by the learned Judge not merely under section 30 of the Evidence Act against all the appellants as the confession of a co-accused, but it has, and this is the real difficulty in the case, formed the foundation and main structure of the whole of the learned Judge's reasoning in the judgment. No criticism could be passed upon the learned Judge for his method of dealing with the rest of the evidence, if this confession had been admissible. He has sought, and found to his own satisfaction, adequate corroboration of the confession in the case of each person whom he has convicted upon it, but the serious question is whether it was admissible at all. Both of us are satisfied beyond question that it was not only inadmissible, but that the learned Judge has really made a serious mistake in not realizing from the first how clearly on his own statement it was rendered inadmissible. The Assistant Government Advocate did not attempt to combat the view which we take upon the assumption that the learned Judge meant what he said. What the learned Judge has said is this:—First, Kishan was clearly asking for a pardon. He refused to give any information to the police until some *quid pro quo* could be, as he hoped, obtained. Secondly, he communicated his frame of mind to Ram Sarup, the investigating officer. Thirdly, on the morning of the 6th of August, Ram Sarup

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took Kishan to the Collector's bungalow for the express purpose of negotiating for a pardon. It is possible that Kishan took part in the negotiation. Of course he did not. But it would be equally absurd to suppose that he was not well aware of the object of the visit to the Collector's bungalow. There was a hitch in the negotiation. Ram Sarup and Kishan were sent back to the Sub-Divisional Officer with a note and one part of Kishan's statement was recorded that day. The rest of it was recorded the next morning. It would not be a violent presumption to conclude that having regard to all that had passed before, Kishan, when he returned to the Sub-Divisional Officer from the visit to the Collector's bungalow in the custody of the Sub-Divisional officer, entertained, and had been encouraged to entertain, reasonable hope that if he told the truth, or what appeared to be a truthful story, he would get a pardon in the end. The learned Judge says in this language:—"The necessity of this exchange of notes between the Collector and the Sub-Divisional Magistrate has been explained. The Collector apparently was at first of the opinion that Kishan should be given a pardon, which was clearly what Kishan was working for. Indeed it would appear that Kishan specifically bargained for a pardon as the price of his statement. The Sub-Divisional Magistrate objected that it would be premature to make a firm offer of the pardon at that stage, and the Collector eventually agreed and it was explained to Kishan that he would have to take his chance, and he then made his statement." So stated, the position is as clear as daylight. If a man prepares the ground by excuse in his own conduct, and invites the other party to treat with him, and the other party goes so far as to consider whether he is willing to pay the price, and eventually, without refusing to do so, postpones the decision until further examination of the article to be sold, there must remain in the mind of the would-be vendor a reasonable hope that when the purchaser sees the article he is thinking of buying, he will pay the price. I have used this commercial illustration, because, throughout the matter was discussed by the executive authorities, and has been considered by the Judge, in the light of negotiation for a bargain. How the learned Judge could possibly come to the conclusion that the making of the confession by Kishan under section 164 of the Code of Criminal Procedure was not caused by the inducement that, if it was satisfactory, a pardon would

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probably be granted to him. I cannot for myself conceive, but, in my opinion, he has plainly found that it was so induced, and where he has failed is in not realizing that section 24 makes a confession so induced irrelevant in a criminal proceeding. Mr. *Malcomson*, on behalf of the Crown, preferred to take his stand upon a denial that the learned Judge meant what we think he said in his judgment, and we, therefore, allowed him to obtain, and tender, copies of the correspondence referred to by the Judge. Any doubt lurking in the mind of any body up to this point is entirely removed by a perusal of this remarkable correspondence. The Sub-Divisional Officer and the District Magistrate exchanged notes with the greatest candour, as indeed they ought, in considering whether or not a pardon should be offered, but they went much further than that. They discussed the terms of the offer, or bargain, which was to be made with the accused. The District Magistrate signed the note on the 6th of August and wrote to the Sub-Divisional Magistrate as follows: "He may, however, be told that if he makes a voluntary confession which is considered to be full and true, his prayer for being made an approver will receive due consideration." How in the world any officer of experience, or any one with any legal training at all, or acquaintance with this section, could doubt that this was an inducement to the man to make a statement, we are at a loss to understand. The very document in which the Magistrate uses that language contains a statement that the confession must be voluntary and without any inducement. The Sub-Divisional Officer in his note expressed his opinion that there was very little value in such a confession. Whether there is or whether there is not any intrinsic value in the statement, the law makes it irrelevant, and the learned Judge ought to have refused to bring it on the record, and to have ruled it as irrelevant under section 24 of the Evidence Act. The result is that it has to be struck out of this case, as well as of the other cases in which appeals are pending, and in which it has been used. We are bound to say that it really is a lamentable result of the expenditure of time and money on this case, and that the error into which both the Judge and the District Magistrate have fallen is an elementary one. Judges from time to time have exhausted themselves in endeavouring to explain the working of this section, and, for my own part, I refer to and repeat what I said in the recent case of *Empress*

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v. *Khela* (1), with which my learned brother entirely agrees. It really ought to be unnecessary for Judges constantly to be referring to the working of this section. It looks as though we were endeavouring to lay down some new principle, when really all we do is to repeat the law as it should be known by those who have to administer it.

This, however, does not dispose of all the difficulties in this case. The learned Judge, in a most lucid judgment, has reviewed all the evidence, but when Kishan's confession is struck out, the balance against the remaining appellants consists of the sworn testimony and identification made by the approver Ubafur, and as against certain appellants, the evidence of one Musammat Ganga Dei. As a matter of principle is involved in their evidence, it is necessary to consider whether as a class those mentioned by Ganga Dei ought to be convicted unless her evidence is corroborated by satisfactory independent testimony. Somehow or other the police got hold of this woman, and it was a creditable piece of detective work, but her husband was a notorious dacoit who was absconding. According to her, he left his house on the night of the dacoity with several of the appellants, and next day returned with the loot. In any case, it is certain that her husband is a fugitive from justice. According to her testimony he is implicated in this dacoity, and, probably, in the others too, and he left in his house, and probably in her custody, silver ornaments and other jewellery, the proceeds of this dacoity. She may or may not have motives of either ill-will or fear against specific individuals whom she has named. She may or may not have been either persuaded or frightened by the police. But, taking her position broadly, she was placed in considerable difficulty. She had every motive for assisting the police, every motive for naming anyone whom the police wished her to name. The police were in a position to put pressure upon her by the very fact of her possession of the property, and to use persuasion with her by the very fact that her husband was absconding. In the case of a low class woman in this country, who has very little independence, education or public spirit to influence her, it is obvious that such a person may become an easy victim to an astute police investigator, and all I can say is that if I had a jury trying this case, I should unhesitatingly have told

(1) (1922) I. L. R., 45 All., 306.

them that they should not convict a single individual on the testimony of the woman alone. It is made no better when there is added to it the testimony of the approver who is one of the most despicable specimens of humanity one can imagine, a man steeped in crime, living at war with society, ready to commit any violence to enable him to carry out his thefts, and ready to sell his comrades if only he can get free himself, and, for my own part, I am not prepared to accept the evidence of a worthless creature of this kind, as corroborating an almost equally worthless and particularly helpless wife of an absconding dacoit. The difficulty in this case is that, having acted, as the Judge has done, very leniently on the confession of Kishan, one does not know what he would have been prepared to act on the residuum which I have just mentioned after Kishan was withdrawn, and really the logical thing to do would be to send the case back; but we accept that in substance nothing is to be gained by that course, and we, therefore, deal with the case by final orders. In the case of four of the appellants leaving out Kishan for the moment we find that the evidence of Ghafur is satisfactorily corroborated by the learned Judge's view of the evidence. These four are Kallan, Nasib Khan, Ashub and Zabar Khan. In the case of these four we dismiss their appeals and confirm their convictions and sentences. In the case of the remained namely, Tara, Dalip, Azan, Kanhaiya, Bucha, Khachera Budhan, Khiali, Chiranji, Bihu or Baba, Kallan son of Diwan, we are driven by force of law to allow their appeals and to direct that they be released, subject to any punishment standing against them unperformed.

This leaves only the case of Kishan. His appeal is also dismissed and we confirm his conviction and sentence. As I have already said, his confession was irrelevant, but his brother pointed out during the argument, and Mr. Malaviya has also argued, that in substance he confessed again before the trial. When he was examined under section 364, before the Committing Magistrate, his previous statement under section 164 was put to him. It ought not to have been, if they knew as much about it as we do now. But he then stated that he had no hope of a pardon. He had discovered that his previous hopes were doomed to disappointment, and he stated that that statement was true. Whether it was or whether it was not, and the probability is that it was not, it is unsafe to which to

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convict him, and I am prepared to agree that that amounts to a fresh confession in the Magistrate's court, which was duly proved against him at the trial, and that his conviction on that ground must stand. It may be said, if so, why is it not a confession made before the trial so as to be proved at the trial affecting the other persons who were being tried jointly with him? I think that technically it could be used under section 30 even against his co-accused. But however satisfactory it may be as a piece of damning testimony against himself, I am not prepared to regard it as of any real value, standing alone, or even in association with the evidence of Ghafur and Ganga Dei, against the other accused. Therefore on that ground, in my opinion, it is still to be disregarded except as sufficient to convict Kishan. Our order, therefore, is that the appeals of the above five are dismissed and of the others are allowed and their convictions are set aside.

KANHAIYA LAL, J.: I agree with the order proposed.

Appeals dismissed.

APPELLATE CIVIL.

Before Mr. Justice Reaves and Mr. Justice Daniels.

1923 May, 16.

KESHO DAS (DEFENDANT) v. HANUMAN PANDE AND ANOTHER (PLAINTIFFS).*

Act (Local) No. II of 1901 (Oudh Tenancy Act), section 158. Act No. XII of 1881 (N.-W. P. Rent Act), section 20, clause (d). "Land". Grove land. Acquisition of proprietary rights.

Plaintiffs sued under section 158 of the Tenancy Act for a declaration that they had acquired under proprietary rights in certain land. The land had been granted rent free about one hundred years previously to their predecessor in title to be used either for cultivation or for planting a grove, and the grantee had in fact planted a grove.

Held that section 158 of the Tenancy Act did not apply as an area occupied by a grove was not "land" within the meaning of that Act, and that in order to get the benefit of section 20, clause (d) of Act No. XII of 1881, the plaintiffs were bound to show that the land had been held rent free, and by at least two successors to the original grantee, for fifty years prior to the 22nd of December, 1873.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Harendra Krishna Mukerji*, for the appellant.

Munshi *Haribans Sahai*, for the respondents.

REAVES and DANIELS, JJ.: This was a suit under section 158 of the Tenancy Act for a declaration that the plaintiffs

* Second Appeal No. 1773 of 1921, from a decree of J. Allsop, District Judge of Ghazipur, dated the 18th of June, 1921, confirming a decree of Ram Chandra, Assistant Collector, First Class of Ghazipur, dated the 30th of September, 1920.

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had acquired under-proprietary rights under that section on the ground that the land in suit had been held rent-free for over 50 years and by two successors of the original grantee. The suit has been decreed by both the courts below. The land is admittedly covered by a grove and the contention of the appellant is that Chapter X of the Agra Tenancy Act, in which section 185 occurs, does not apply to groves.

The land in suit is said to have been granted to the predecessor of the plaintiffs under a written "dampatra" about 100 years ago. Both the courts have found that the grant is genuine. The terms of the grant are reproduced in paragraph 1 of the plaint. They give the grantee the right either to use the land for cultivation or to plant it with a grove. The grantee did in fact plant a grove on it. Both in the plaint and the written statement the land is described as grove, and the finding of the court below is that the land is admittedly grove land and has been held as such from the time of the last revision of records, which was between 30 and 40 years ago.

Land as defined in section 1 of the Tenancy Act is limited to land which is let or held for agricultural purposes, and it has been held in several decisions of this Court that this definition does not include areas occupied by groves. It is unnecessary to refer to the earlier decisions, as the matter has been finally set at rest by the Full Bench decision in *Kesho Prasad Singh* v. *Sheo Pargash Ojha* (1).

The learned District Judge gets out of this difficulty very summarily. He says that the land was not let to be turned into a grove but was let for agricultural purposes, and, therefore, it is "land." It is difficult to see how the learned Judge could say this in face of the express terms of the title deed which is the basis of the plaintiffs' claim, and of the plaintiffs' own admission in para. 1 of the plaint. But even if it had been correct, it would not dispose of the case. As soon as the zamindar allowed the grantee to convert the land into grove, it would cease to be land held for agricultural purposes within the meaning of the definition. But, assuming that we hold that on the pleadings and the plaintiffs' title deed it was not open to the District Judge to come to this finding, the respondents are prepared to support the decree on the ground that the restricted definition of "land" contained in the present law was not to be found in the Rent Act of 1881. Under that Act "land" included groves. They rely on section 30 of that

(1) (1921) I. L. R., 44 All., 19.

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Act and contend that they had acquired under-proprietary rights, under clause (*d*), before the present Tenancy Act came into force. This is a new case put forward for the first time in second appeal and the answer to it is that in order to succeed under section 30 (*d*) of the Rent Act of 1881 it was necessary for the plaintiffs to show that the land had been held rent-free, and by at least two successors to the original grantee, for 50 years prior to the 22nd of December, 1873. It has not been found by either court that this was the case and we have not been referred to any evidence on which such a finding could be based. We think, therefore, that the appeal must succeed and it is not necessary to go into the further point urged by the appellant that even on the finding of the court below the land is not really held rent-free. It is, no doubt, shown in the papers as grove not assessed to rent (*bila lagan*), but it is also found by the court below that according to the *wajib-ul-arz* all groves not assessed to rent pay half their produce to the proprietor. There is on the record a judgment of this Court, in Civil Revision No. 31 of 1912, between the defendant and the father of the plaintiffs, upholding a decree in favour of the former for a claim to produce of the grove by way of rent.

We allow the appeal and, setting aside the decree of the court below, dismiss the suit with costs in all courts.

Appeal allowed.

REVISIONAL CRIMINAL.

Before Mr. Justice Ryves.

EMPEROR v. JWALA PRASAD.*

1923

May, 21.

Act (Local) No. IV of 1910 (United Provinces Excise Act), section 61 (c) (Illegal sale of liquor by one partner in contravention of terms of licence—Liability of other partner.

Where one of two partners in a licence for the sale of liquor is liable to commit a breach of the conditions of the licence, the other partner is equally liable to the penal provisions of the United Provinces Excise Act, 1910. *Queen-Empress* v. *Tapib Ali* (1), and *Emperor* v. *Baku Lal* (2), referred to.

THIS was a reference made by the District Magistrate of Agra. The facts of the case are thus stated in the referring order :—

"Two excise licensees, who are partners in a country liquor shop licence, have been convicted under section 61 (c) of the U. P. Excise Act, 1910 of committing a breach of the conditions of the licence by selling liquor out of the prescribed hours and also by selling adulterated liquor. One of the partners, Tika Ram, was present at the shop when these offences were detected. It is admitted that Jwala Prasad, the other licensee, was not

* Criminal Reference No. 265 of 1923.

(1) (1900) I. L. R., 24 Bom., 423.

(2) (1912) I. L. R., 34 All., 319.

present and there is no suggestion that he knew anything about the irregular sales. The Deputy Magistrate has consulted Jwala Prasad on the strength of the ruling of the Hon'ble High Court in *Emperor v. Baba Lal* (1). It has been argued before me that that ruling establishes only the liability of a master for the act of his servant, and that it does not follow that one partner is liable for the acts of the other partner. I do not accept this contention. It seems to me that one partner must be held to be liable for the acts of the other partner. The second point, however, urged before me in revision appears to be valid. The important point in the ruling quoted, which followed the case of *Queen-Empress v. Tuck Ali* (2), was that in order to establish the offence under the section of the Opium Act it was not necessary to prove intention, *mens rea* or knowledge and that the mere act constituted the offence. In the present case, section 61 (*a*) of the U. P. Excise Act makes it an offence if any one, being the holder of a licence, wilfully does or omits to do anything in breach of any of the conditions of the licence. The use of the word "wilfully" appears to me to make it clear that in order to establish this offence it is necessary to prove intention or knowledge, and on the facts found by the Deputy Magistrate there is no such proof. I, therefore, forward the record for the orders of the Hon'ble High Court with the recommendation that the conviction of Jwala Prasad be set aside."

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The parties were not represented.

WALSH, J.:—I do not agree with the District Magistrate. *Mens rea* has nothing to do with it. It is quite true that the section requires a wilful breach of the condition. A man may accidentally commit a breach. For example, if a man's watch was five minutes slow and he sold liquor at two minutes to eight by his own time, and it turned out to be two minutes past eight by the right time, that would not be a wilful breach. But a sale is a sale, and I have not the slightest doubt that the servant intended to sell the liquor and to take the money for it, and if he pocketed the money and refused to hand it over to his master and said that it was an accidental sale and not a wilful sale, and therefore the money did not belong to the master but to the servant, the master would have been very angry. The real test, so far as agency is concerned, is not the nature of the act but the nature of the business. The nature of the act is the test which decides the criminality. If the sale is wilful or the breach of the licence is wilful, then the servant has committed an offence. But the question still remains whether his master is liable, and in all these *quasi* civil transactions, which are really questions of contract, the view has always been held that the Legislature intended that the maxim making the superior answerable should apply to sales which are carried through in breach of the conditions of the licence by a man whom the master has put in the shop for the purpose of selling on his behalf and for his profit, and therefore if the man who actually took the money and transferred the liquor to the purchaser had been a servant, Jwala would have been answerable.

(1) (1923) I. L. R., 45 All., 319.
(2) (1900) I. L. R., 24 Bom., 223.

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as his master. The law of partnership is merely a branch of the law of agency, just like the law of master and servant, and for this purpose two partners stand to one another in the same relation as master and servant. This was a wilful breach of the licence. It was committed by Tika Ram as agent for Jwala the other partner, and in my opinion that makes Jwala equally liable, and the Magistrate was right. I see no reason to interfere and I direct the record to be returned to the District Magistrate. I may add that I agree with both the cases which have been cited, namely *Queen-Empress* v. *Tyeb Alli* (1) and *Emperor* v. *Babu Lal* (2). It is hard on Jwala if he was on bad terms with Tika Ram and objected to this class of illicit dealing; but if he can prove that, he can press for the recovery of his fine from Tika Ram, I think, in the taking of the partnership accounts. Let the record be returned.

APPELLATE CIVIL.

1923

May, 22.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Piggott.

MUHAMMAD SAID (DEFENDANT) v. BISHAMBHAR NATH (PLAINTIFF).*

Act No. IX of 1872 (Indian Contract Act), section 11. Sale by a debtor to a money lender. Vendor found to be a minor. Equitable power of Court to make decree for restitution on terms of repayment of consideration.

Notwithstanding that a contract of sale entered into by a minor may be destitute of legal effect, the court has an equitable power, wholly distinct from the existence of a contractual or non contractual relation of the parties, which entitles it, in a case brought by the minor for cancellation of the sale-deed and restoration of the property, to make a decree conditional upon repayment of any consideration actually received by him. In each case the test must be the conduct of the parties.

THE facts of the case material for the present report are shortly these :

The plaintiff Bishambhar Nath brought the present suit, through his father Janki Prasad as his next friend and certificated guardian, for the cancellation of a sale-deed, dated the 20th of December, 1916, and possession of certain zamindari property transferred thereby, on the ground that at the date of the sale-deed the plaintiff was a minor. It appeared that Janki Prasad had married several times. By one wife he had a son Sheo Narain, and by another he had another son, the plaintiff. It was alleged that Janki Prasad and his sons were possessed of certain immovable property including a grove in the city of

* First Appeal No. 53 of 1921, from a decree of Gauri Shanker Tewari, Judge, Small Cause Court, exercising the powers of a Subordinate Judge of Allahabad, dated the 19th of December, 1920.

(1) (1900) I. L. R., 24 Bom., 423.
(2) (1912) I. L. R., 34 All., 319.

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Cawnpore. The defendant's father, Abdul Aziz, was a tenant of the grove and was anxious to acquire it. Proposals made to Janki Prasad for the transfer of the grove, either by sale or by way of a permanent lease, fell through. Litigation thereupon ensued between Abdul Aziz and Janki Prasad, which terminated in favour of Janki Prasad. By this time Sheo Narain attained majority and took to dissolute ways of living. It was alleged that Abdul Aziz purchased Sheo Narain's share of the grove from him and it was alleged that with a view to injure Janki Prasad he instigated Sheo Narain to institute a suit for partition against Janki Prasad and other members of the joint family. This was done and the case was fought up to the High Court (See I. L. R., 34 All., 505). Sheo Narain from time to time transferred practically the whole of his share in the property to Abdul Aziz. It was further alleged that in July, 1916, when the plaintiff was about 16 years old he fell under the evil influence of Sheo Narain, and the defendant, taking advantage of the plaintiff's ignorance and dissipated ways of living and extravagance, induced him to sell his entire share in the various items of properties by four different sale-deeds executed within three months between July and September, 1916. The sale-deed which was the subject-matter of the suit was the last of these four. The defendant in his reply pleaded that the plaintiff was not a minor at the date of the sale-deed in dispute and, in the alternative, that the plaintiff had fraudulently misrepresented himself to be a major and had assured the defendant of his having attained the age of majority, by handing over to the defendant a horoscope and a medical certificate. The horoscope showed that the plaintiff was born in May, 1898. The defendant further stated that both the plaintiff and Sheo Narain had assured him that the horoscope was really the horoscope of the plaintiff. The defendant urged that he was a purchaser in good faith for valuable consideration and the plaintiff, even if he was a minor at the date of the sale, was not entitled to recover possession without refunding the sale consideration received by him. The Subordinate Judge decreed the suit. He held that the plaintiff was a minor at the date of the sale-deed and the defendant was not entitled to any restitution from him.

The defendant appealed.

Mr *B. E. O'Conor* (with him Maulvi *Iqbal Ahmad*) argued the appeal on the facts and submitted that the burden of proving his minority at the material date lay on the plaintiff, and, on the evidence, that burden had not been discharged.

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Dr. *Kailas Nath Katju* (with him Munshi *Krishna Bihari Lal*), for the respondent, submitted that the lower court was right in holding on the evidence that the plaintiff's minority had been established. He further submitted that the defendant's claim for refund of the sale consideration was not legally admissible. The contract of sale was void *ab initio*, and neither section 64 nor section 65 of the Indian Contract Act applied. Section 41 of the Specific Relief Act apparently [illegible] the case, but that section directed that such compensation was to be granted which justice might require. If a minor's contract was declared by the legislature to be void *ab initio*, it would be impossible to say that justice required that he should be made to refund the money, which he might have spent in extravagance or otherwise. It would be clear if the minor had obtained possession, under a void contract, of some property which could be followed specifically in his hands, the court might compel him to reconvey the property so obtained; but where he had obtained cash and nothing else and it was [illegible] to follow the money in specie or in property obtained thereby, a direction to refund the non-existent cash would virtually amount to enforcing the contract. Moreover, a relief, which would not be granted to the defendant if he were to sue into court as plaintiff and sue upon the contract, should not be granted to him as against the minor simply because the minor was compelled to come into court and sue for relief. Or in advance, if a minor were to sue for cancellation of a mortgage deed, it would be wholly illogical and unjust to compel him to refund the mortgage money, under the cloak of section 41 of the Specific Relief Act, when the court would not enforce the [illegible] deed at the instance of the mortgagee at all. He relied upon *Gaya Prasad* v. *Sarjan Chaudhari* (1), which was affirmed on Letters Patent Appeal (L. P. A. No. 74 of 1915, decided on the 17th of December, 1915). He also referred to *Le Lo Ltd.* v. *Shalli* (2), *Radhe Shiam* v. *Behari Lal* (3) and *Dhara Singh* v. *Gajan Chand* (4). In *Jagar Nath Singh* v. *Lalta Prasad* (5) BANERJI, J., did take the view that the court had jurisdiction to direct restitution from a minor on the ground that "an infant shall not take advantage of his own fraud." But it was submitted that that view was

(1) (1915) 29 Indian Cases, 972.
(2) (1941) 3 K. B., 607.
(3) (1918) I. L. R., 40 All., 558.
(4) (1918) 16 A. L. J., 443.
(5) (1908) I. L. R., 31 All., 21

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not based upon any correct legal basis and had not been accepted by RICHARDS, J., who was a party to that case. The matter was really fully covered by the dictum of Lord JUSTICE ROMER in the case of *Thurston* v. *Nottingham Permanent Benefit Building Society* (1), that "the short answer is that the court of equity cannot say that it is equitable to compel a person to pay any money in respect of the transaction which, as against that person, the legislature has declared to be void." In *Stocks* v. *Wilson* (2), the dictum of LUSH, J., that "if the minor has obtained money he can be compelled to refund it," was too wide and was expressly dissented from by Lord SUMNER and other Judges in *Leslie's* case.

Mr *B. E. O'Conor*, in reply, after addressing the Court on the question of fact as to the minority of the respondent, submitted that the court had jurisdiction, where the minor himself came into court to seek relief, to put him on terms. The old maxim "he who seeks equity must do equity" fully applied. The decision of the case of *Jagar Nath Singh* (3) was right and had never been departed from in the Allahabad High Court. RICHARDS, J., did not differ from DANIELS, J., on the question of law, though there was a difference of opinion between them on the facts. Moreover, in the analogous cases of transfers of occupancy and exproprietary holdings, the Allahabad High Court had always taken the view that if the transferor, *i.e.*, the tenant himself, came into court and sought the cancellation of the transfers made by him, he was bound to refund. Section 41 of the Specific Relief Act fully applied and gave the court ample jurisdiction to give such directions as the justice of the case might require. In the face of that section the English decisions were not material in India.

The fact that the present suit was one for recovery of possession and not for the cancellation of a deed would not make any difference. The plaintiff could not succeed till he got rid of the sale deed executed by him. He referred to the cases of *Mohori Bibee* v. *Dharmodas Ghose* (4), *Dattaram Govindbhai* v. *Vinayak Balkrishna Apshe* (5), *Ganesh Lala* v. *Bapa* (6) and *Baharan Upadhya* v. *Uttamair* (7).

(1) (1903) 1 Ch. 54.
(2) (1913) 2 K. B. 235, at pp. 243, 248.
(3) (1901) I. L. R. 24 All. 71.
(4) (1903) I. L. R. 30 Cal. 539.
(5) (1903) I. L. R. 27 Bom. 191.
(6) (1897) I. L. R. 21 Bom. 198.
(7) (1901) I. L. R. 24 All. 772.

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MEARS, C. J., and PIGGOTT, J.:—We are concerned in this appeal with a sale-deed, dated the 20th of September, 1916, whereby the plaintiff Bishambhar Nath purported to convey to the defendant Muhammad Said a four annas share in certain zamindari property in the village of Kurwan, near Cawnpore. There are two issues for determination:—

(i) Was Bishambhar Nath a minor on the 20th of September, 1916?

(ii) If the first issue be found in the affirmative, should the decree in favour of the plaintiff be made subject to repayment of any consideration actually received by him from the defendant on account of the sale-deed in question?

[Their Lordships then examined the evidence bearing on the first issue in detail and held that Bishambhar Nath was a minor on the 20th of September, 1916.]

We now turn to the second question. Should the decree in favour of the plaintiff be made subject to any and what conditions of repayment?

Notwithstanding that the effect of our first finding is to declare the contract between the parties destitute of legal effect, we are of opinion that we have an equitable power, wholly distinct from the existence of a contractual or non-contractual relation of the parties, which entitles us in a case of this kind to make a decree conditional upon repayment. In each case the test must be the conduct of the parties. On the one hand, the father of the plaintiff contends that the defendant and his father have brought about the moral and financial ruin of his two sons. He maintains that Abdul Aziz secured influence over Sheo Narain, influenced him adversely to his own interests and those of his father, acquired the whole of his share of the family property, and by putting him in funds enabled him to commence a course of dissipation. Similarly when Bishambhar Nath, in July, 1916, was minded to raise money, he was brought by Sheo Narain to the defendant and the latter adopted the same course with him and most carefully and cautiously kept all knowledge of his transactions with Bishambhar Nath from the father. He accepted from Sheo Narain a document of doubtful authenticity, the horoscope; he relied upon a paragraph in a written statement of the father, he contented himself with a medical certificate whereas, it is contended, he ought to have gone to the father and told him of the son's intentions and asked him for proof of his age. It is

said that he did not do so as he was well aware that the father would have disapproved strongly of the suggested transactions and would have asserted his son's minority, and, as against the defendant, the case has been put as one of studied abstention on his part from all communication with the father and as one on which he was prepared to take risks, actuated by a desire to add to the property originally owned by Sheo Narain that of his brother Bishambhar Nath. 1922 MURLIDHAR v. SHEO NARAIN

In one view of the case it is possible that Sheo Narain and Bishambhar Nath did perpetrate a fraud upon the defendant. They may have "planted" a forged horoscope upon him and Sheo Narain may have made verbal representations as to the age of Bishambhar Nath. This is, however, largely a matter of surmise, and proof of those matters was on the defendant. He failed to give the requisite proof. Whilst due protection must be given to persons in the position of the defendant, often victims of a clear fraud, they must nevertheless make out a plain case for equitable relief, and the very required for such relief puts upon the court the obligation of looking carefully into the conduct of the petitioner in each case. We think that the father of the minor plaintiff is right in charging the defendant with having been to some extent an outsider, in his dealings with his two sons, and, as regards Bishambhar Nath, we think that in the defendant's anxiety to acquire the property he was content to run some degree of risk. Purchasers or money-lenders who deal with persons who are hovering upon majority, and the ascertainment of whose exact age is impossible must not complain if their credulity leads them at times into litigation and loss. We are of opinion that we ought not to exercise our powers of equitable relief in this case and that the appeal must be dismissed. We, however, direct that in this and the trial court each party shall pay his own costs.

Appeal dismissed.

Before Mr. Justice Walsh and Mr. Justice Kanhaiya Lal.

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BETI MAHALAKSHMI KAL AND ANOTHER (DEFENDANTS-APPELLANTS) v. RAJAN SINGH AND ANOTHER (RESPONDENTS).*

Civil Procedure Code, section 145. Execution of decree. Immovable property hypothecated as security. Mode of realization of security bond.

Where [illegible] must be the due performance of a decree and he [illegible] of security by pledge of immovable property, without undertaking [illegible] personally to satisfy the amount, the [illegible] the security [illegible] the property [illegible] of the hypothecated property, the [illegible] bond can under [illegible]

* First Appeal No. 200 of 1922, from a decree of Mahomed Zaki Hasan, Subordinate Judge of Mainpuri, dated the 20th of April, 1922.

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tion 145 of the Code of Civil Procedure be enforced [illegible] directly by execution, and there is no necessity for the filing of a separate suit on the bond. *Jhabo Kuar v. Sarju Pd.* (1), *Mahadeo Prasad Sah v. Bhagwan Das Marwari* (2), *Bijoy Kumar Sen v. Ram Pertab Singh* (3), *Shyam Sundar Lal v. Gopal Singh* (4), *Sohan Lal v. Bhagwan Das* (5), *Ganga Sahai v. Kanhaiya Lal* (6), *Ram Lal v. Ram Lal* (7).

THE facts of this case are fully stated in the judgment of the Court.

Dr. *Kailas Nath Katju* and *Pandit Lalji Pandit Zutshi*, for the appellants.

Munshi *Kanhaiya Prasad* and *Munshi Gokulkar Prasad*, for the respondents.

WALSH and KANHAIYA LAL, JJ.: This is an appeal from an order refusing to enforce a security bond, filed under order XLI, rule 5 of the Code of Civil Procedure, by an execution proceeding. In the course of an appeal pending in this Court, an order for the stay of execution of a decree for costs was obtained by the judgment-debtor pending the decision of that appeal, and a security bond, executed by him and his surety Chaudhri Badan Singh, was filed, whereby the latter agreed to stand security for Rs. 15,000 and hypothecated certain property for the payment of the same in case the money which might be found due under the decree was not realized from the judgment-debtor. The security bond stated: "We the executants willingly give security for Rs. 15,000 and after hypothecating the property specified below agree that if the appellate court affirms the decree of the court of first instance, then I, Rao Narsing Rao, will duly carry out the decree of the appellate court, and whatever costs may be allowed under the said decree on account of the costs of the trial court and of the appellate court shall be paid by me (Rao Narsingh Rao) with interest, irrespective of the above-mentioned security for Rs. 15,000. If Rao Narsingh Rao does not do so, then the sum which may be due under the decree may be realized from the hypothecated property of the executants."

The court below has found that no personal liability was undertaken by the surety under the above deed and that the only remedy of the decree-holder was to enforce the mortgage security by a separate suit for sale. Section 145 of the Code of Civil Procedure provides that where any person has become

(1) (1895) I. L. R., 17 All., 99.
(2) (1916) I. L. R., 38 All., 327.
(3) (1919) I. L. R., 42 All., 158.
(4) (1903) I. L. R., 30 Calc., 1060.
(5) (1917) I. L. R., 41 Mad., 927.
(6) (1916) I. L. R., 39 All., 225.

liable as a surety for the performance of any decree or any part thereof, or for the restitution of any property taken in execution of a decree, or for the payment of any money, or for the fulfilment of any condition imposed in any suit or proceeding, the decree or order may be executed against him, to the extent to which he has rendered himself personally liable, in the manner provided for the execution of decrees, and such person shall, for the purposes of appeal, be deemed a party within the meaning of section 47. The object of this section is to provide that where a person has become liable as a surety for the performance of a decree or for any of the purposes above specified, the party for whose benefit the security has been given may enforce the security by executing the decree or order against the surety in the same manner as if the surety had been a party to the decree or order and was directed by the decree or order to perform the obligation undertaken by him. Section 253 of the old Code of Civil Procedure was limited to cases where a security bond was filed for the performance of a decree, and authorized the enforcement thereof against the surety to the extent to which he had rendered himself liable, in the same manner as a decree could be executed against the defendant. In the clause, "to the extent to which he has rendered himself liable," the word "personally" was added by the present Code of Civil Procedure, but by the addition of that word it could hardly have been intended to limit the enforcement of the security to a personal liability, for forms 2, 3 and 4 of appendix G1, appended to the Code of Civil Procedure, provide for the hypothecation of property to secure the performance of the obligation undertaken by the surety. The personal or individual liability of the surety under the security bond may not, always, be as extensive as that of the judgment-debtor, and the object of the above provision clearly is to limit the enforcement to the extent provided for by the security bond. Beyond a statement that the surety willingly gave security for Rs. 15,000 there was nothing in the terms of the present bond to indicate that he undertook a personal liability. On the other hand, there was a clear indication that the money which may be found due on the decree passed on appeal would be realizable in the first instance from the judgment-debtor, and that if the judgment-debtor did not pay the same, it would be recoverable from the property hypothecated by the surety. There was no personal covenant by the surety to pay the same in case the

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hypothecated property was sold [illegible]. The only question for consideration in the present case is whether section 145 of the Code of Civil Procedure is applicable and whether the security bond [illegible] upon for the execution of the decree. The security bond did not purport to have been executed under section 145 of the Code. It contains an undertaking [illegible] which granted the stay of execution subject to the production of such security, and [illegible] *Jai Ram* v. *Sarup Rai* [illegible], which [illegible] by the Court below in the same way [illegible]. In the case of *Ram Prasad* v. *Mahadeo Prasad* [illegible]. In the case of *Raj Rajeshwar Singh* v. *Jai Singh* [illegible] their Lordships of the Privy Council [illegible] to be enforced [illegible] the hypothecated property [illegible].

The case [illegible] v. *Mahadeo Prasad* [illegible] tion in the hypothecated property [illegible] to a third person who could not be [illegible] the purposes of section 145 of the Code of Civil Procedure [illegible] the decree and [illegible] enforced except by [illegible] *Shyam Sunder Lal* v. *Raja Durga Singh* [illegible] *Subramania Ayyar* v. [illegible] [illegible] execution with [illegible] Where the equity of redemption [illegible] the surety [illegible] the property [illegible] security can be recovered, [illegible] Civil Procedure is intended to [illegible] rity. The appeal [illegible] and the order of the court below [illegible] to that court with a direction to [illegible] proceed [illegible] accordance with law.

Appeal allowed.

(1) (1925) I. L. R., 47 All., 99
(2) (1926) I. L. R., 48 All., 710
(3) (1919) I. L. R., 46 All., 173
(4) (1924) I. L. R., 70 All., 995
(5) (1909) I. L. R., 36 Calc., 1060
(6) (1917) I. L. R., 41 Mad., 357

Before Mr. Justice Ryves and Mr. Justice Daniels.

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AFTAB BEGAM AND ANOTHER (PLAINTIFFS) *v.* MUHAMMAD AYUB AND OTHERS (DEFENDANTS).*

Mortgage—Possession of mortgaged property subsequently obtained by a person having no title thereto—Substituted security.

The doctrine of substituted security only applies where possession of a particular property has been awarded to one party in lieu of an undivided share in the whole property which was the subject of partition. It does not apply when the entire property mortgaged belonged to the mortgagors, and a person with no title has subsequently obtained possession of a portion of it behind the back of the mortgagees.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. *Surendra Nath Sen* and Hafiz *Mushtaq Ahmad*, for the appellants.

Dr. *Kailas Nath Katju*, for the respondents.

RYVES and DANIELS, JJ.: This appeal has been argued on one single point. It relates to a shop in Jaunpur, which together with other properties was mortgaged by the first four defendants to the defendants Nos. 5 to 12. These defendants brought a suit against their mortgagors and obtained a decree. In execution of that decree they have applied for the sale of the shop in suit. The present suit was instituted by the plaintiff for a declaration that the shop was not liable to sale. The plaintiff has died during the course of the proceedings and the appellants are his heirs. The facts on which they based their claim are that in 1905 the 13th defendant instituted a partition suit against the first four defendants, and obtained a decree declaring her right over 4 *sihams* out of 81 in this shop and in nine other houses and a grove. These partition proceedings were subsequent to the mortgage, and the mortgagees were not parties to them. The partition decree is, therefore, not binding on the mortgagees. The plaintiff's case, and the case on which the defendant No. 13 obtained partition, was that the shop originally belonged to one Ghulam Muhammad, whose heirs were admittedly the first four and the 13th defendants. It is now found as a fact by both the courts below that this particular shop did not belong to Ghulam Muhammad. The 13th defendant, therefore, had no right to any

* Second Appeal No. 1051 of 1922, from a decree of M. P. Hachchinsky, District Judge of Jaunpur, dated the 24th of May, 1922, confirming a decree of Nabi Ahmad Haider, Subordinate Judge of Jaunpur, dated the 30th of September, 1921.

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... share in it, and a ... partition decree which ... was subsequently ... in suit. Her ... the ... the plaint. ... the doctrine of subrogation ... [illegible] ... to be transferred to ... obtained in lieu of ... defendant in this ... The ... lower Courts, and, in our opinion, ... The doctrine of subrogation only applies ... particular property has been added to ... undivided share in the whole property ... partition. It does not apply ... property belonged to the ... has subsequently obtained ... the back of the mortgage. ... was executed was a perfectly valid mortgage ... entitled to take out execution ... of the mortgaged property. Their right cannot be affected by any subsequent transfer to the plaintiff or his predecessor in interest. We accordingly affirm the decision of the lower Courts and dismiss the appeal with costs.

Appeal dismissed.

1933 *May*, 26.

Before Mr. Justice Lort and Mr. Justice Jack.

JAGESAR PANDE ... v. ... DAT PANDE AND ...

Hindu Law ... property without legal ...

An alienation of family property made by ... Hindu family without legal ... is voidable at the instance of the ... [illegible] ... parceners in the property. ... and *Sankara Tevar v. Perumal*[2], followed.

THE facts of the case ... appear from the judgment of the Court.

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* Second Appeal No. 1579 of 1931, from a decree of Lalchand Narain Pandey, Subordinate Judge of Basti, dated the 30th of July, 1931, confirming a decree of Lal Jwala Dat Dube, Munsif of ..., dated the 22nd of December, 1930.

(1) (1921) I. L. R., 45 Mad., 429.

(2) (1923) I. L. R., 46 Mad., 40.

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JANUARY 29

JAGDEO PANDE v. DEO DAT PANDE

Pandit *Narmadeshwar Prasad Upadhya*, for the appellants.

Babu *Purn Lal Banerji*, for the respondents.

RYVES and DANIELS, JJ.:—This case has been referred to a Bench because the precise point has not been previously decided. The question is whether the reversioner has a right to challenge an alienation made by the father as manager of a joint Hindu family which the son, who had a right to challenge it, did not challenge during the father's lifetime. The facts are these. Mahabir Pande and his minor son, Bansgopal, constituted a joint Hindu family. Mahabir Pande, on the 2nd of February, 1917, made a gift of the suit property to his wife Musammat Ramraji. The deed of gift purported to constitute her full owner of the property. Mahabir died shortly after making the gift. Bansgopal died in November, 1917. On the 3rd of May, 1920, Musammat Ramraji executed a deed of conditional sale in favour of the defendant for a sum of Rs 316. The plaintiff, who is the next reversioner, sues on the assumption that Musammat Ramraji held only the estate of a Hindu widow or a Hindu mother, for a declaration that the deed of conditional sale is not binding on him after Musammat Ramraji's death.

The question, therefore, is whether the plaintiffs are entitled to challenge the deed of gift. If Musammat Ramraji had a good title under the deed of gift, she was entitled to deal with the property as she liked. If the plaintiffs can claim the same right as Bansgopal had to challenge the gift, then the defendant will have to justify it on the ground of legal necessity. It has been found by the court below that there was legal necessity to the extent of Rs 250 out of Rs 316, but both the courts below have dismissed the suit on the ground that the plaintiffs are not entitled to challenge the deed. With this finding we agree. No authority for the right claimed by the plaintiff has been shown to us either in the Hindu texts or in the decided cases. There is ample authority for the view that an alienation by the manager of a joint Hindu family without necessity is not absolutely void. It is voidable at the instance of the persons whose interests are affected by it, namely, the co-parceners in the property. This has been held in two recent Madras cases, *Subba Goundan* v.

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Krishnamachari (1) and *Sankara Varia* v. *Unnier* (2). The point was of importance, as on it depended whether the persons setting aside the alienation were entitled to mesne profits from the date of the alienation, or only from the date of repudiation. There is authority of the Court to the same effect in *Sheo Gholam* v. *Badri Narain Lal* (3).

The interests of the plaintiffs were in no way affected by the deed of gift when it took place. They had no right in the property whatever during the lifetime of either Mahabir or his son. It would be giving a great and unwarranted extension to the rights of reversioners as hitherto understood to allow them the right to challenge an alienation under the circumstances found in the present case. In our opinion the decision of the courts below is correct, and we accordingly dismiss the appeal with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Lindsay and Mr. Justice Daniels.

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March, 29.
May, 21.

ABDUL WAHID KHAN v. ABDULLAH KHAN.*

Criminal Procedure Code, section 133—Jurisdiction—Revision—High Court's powers of revision—Public way—Dedication of land as a public road.

The jurisdiction of a Magistrate to take action under section 133 of the Code of Criminal Procedure is not ousted because one of the parties to the dispute before him may have set up a *bond fide* claim of right to the subject thereof. *Emperor* v. *Dost Muhammad* (4), overruled. *Ram Sagar Mandel* v. *Alek Nashar* (5), referred to.

The main question before the Magistrate here, whether, upon the facts proved, the proper legal conclusion was that certain land was merely village waste land or land dedicated to the use of the public as a road way, it was *held* by WALSH and LINDSAY, JJ. (DANIELS, J., dissenting) that the proceedings of a Magistrate under section 133 of the Code of Criminal Procedure, whereby, on the finding that the land in question was the way, he ordered one of the parties to abate a nuisance for which he was liable, were a proper subject for the exercise of the High Court's powers of revision.

Observations by WALSH, J., on the fact that it can be a question of law that land has been validly dedicated to the use of the public as a road way.

THIS was a reference made by the Sessions Judge of Azamgarh.

* Criminal Reference No. 150 of 1922.

(1) (1921) I. L. R., 45 Mad., 449
(2) (1922) I. L. R., 46 Mad., 40
(3) (1915) 11 A. L. J., 708
(4) (1905) I. L. R., 28 All., 98
(5) (1922) I. L. R., 49 Calc., 682

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The facts of the case sufficiently appear from the judgment of DANIELS, J.

Mr. *J. M. Banerji* and *Maulvi Iqbal Ahmad*, for the applicant.

Babu *Piari Lal Banerji*, for the opposite party.

The following judgments were delivered on the 29th of March, 1923.

LINDSAY, J.:—The facts which have led up to this reference are set out in the order of my learned colleague and I need not repeat them.

The recommendation of the Sessions Judge is based upon two grounds:—(1) that the Magistrate should have stayed his hand and should have referred the parties to the civil court when he found that a *bona fide* and substantial dispute as to title had been raised between the parties; and (2) that on the merits the order of the Magistrate was not a proper order inasmuch as it had not been proved that the way in question was a public way. As to the first of these grounds, we are both agreed that the Magistrate's order cannot be discharged because he failed to send the parties to the civil court. The ruling in *Emperor* v. *Dost Muhammad* (1) cannot be accepted as a correct exposition of the law.

On the merits, however, I am of opinion that the Magistrate's order is not proper, and I would, therefore, accept the recommendation of the learned Sessions Judge.

With regard to the argument that this is not a case for the exercise of our revisional jurisdiction, all I desire to say is that the discretion we have to interfere ought to be exercised in all cases where an attempt is made to abuse the process of the court, so as to prevent parties from resorting to the criminal courts to compel a decision on civil matters which properly lie within the cognizance of the civil courts.

The present case constitutes, to my mind, an attempt of this nature, and I, therefore, feel at liberty to scrutinize the evidence so as to ascertain whether the complainant has proved that the way in question is a public way.

We are not concerned here with any road made under statutory powers or vested in any public or local authority. We are dealing with an unmetalled path or track which ki[l]s two sides of a village situated in the environs of the town of

(1) (1905) I. L. R., 28 All., 98.

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Azamgarh. The parties to the case are co-sharers in the village, whose shares have been divided by partition. Their houses are adjacent and abut on the disputed way. In order to show that this way is a public way, it must be proved that it has been dedicated to the public generally. A dedication to a limited section of the public is void and of no avail.

Such general dedication has to be inferred from the conduct of the owners of the soil and from uninterrupted user of the way by the general public.

So far as the conduct of the owners is concerned, we have the admitted fact that when partition of the village was carried out, the soil over which this way passes was divided between the co-sharers without any reservation of a right of passage for the public. The complainant himself was allotted one of the portions of this land (plot No. 320) and it is difficult in the circumstances to see how he can be heard to say that he has dedicated a right of passage to the general public. Nor indeed did he make any such allegation in the complaint which he lodged in the Magistrate's court. In this he described the way as follows:

"A footpath (*rāhgīr*) by which all the people of the village and my cultivators, (*muzāriān*), I presume, the co-sharers, have been passing and repassing for over twenty years, and which is used for passing to and fro by the people [the complainant] has ownership right] belonging to families which live in that quarter."

That, in my opinion, is not a description of a road used by the public, but of one which is used by the tenants and residents of the village.

In his deposition before the court the complainant improved on this description and said the road had been used by the public for 30 or 35 years. In answer to the court he spoke of it as being used by people of the town and people from outside when they come to visit him at his house.

The oral evidence in the case is, in my opinion, vague and unconvincing and does not establish user of this road by the general public. Some of the evidence is clearly that of partisan witnesses and may be discounted.

The patwari, who speaks of the way being public, has been in that office for only four or five years, though he speaks of having known the locality for a longer period. He admits that in the settlement record the land is recorded as fallow or waste land (*banjar*) and that there is no village map or record showing the existence of a public right of way.

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I place no reliance on the testimony of the two tenants, Naresh and Sadaphal.

Then there is the evidence of Roshan Khan, a veterinary surgeon, who has been in practice in Azamgarh for 11 years. This evidence is very cautious and the sum and substance of it is that he uses the road when he goes to visit the "Babus" (*i.e.*, the zamindars). He speaks of it as being the main way to go to the complainant's house. He also speaks of visiting the house of one Muhammad Idris and using this road for the purpose. We are told that this gentleman is or was a Deputy Collector, who occupied a house in the village.

The last witness is the Secretary to the Municipality, who says he has visited Sidhari and driven over the road in an *ekka* or four-wheeled carriage. His cross-examination suggests that he has little occasion to visit the village and that he only goes there to visit the Babus (*i.e.*, the zamindars).

Such is the evidence produced for the complainant. The evidence for the opposite party is of little value, with the exception of that of a partition *amin*, who carried out the partition of the village. He had before him, at the time of giving his evidence, the partition map and record and he proves that the land in dispute (No. 320) was divided among the co-sharers as "banjar," and that there was no record of its being used as a public way. He states definitely that there were only two roads (*rastas*), *viz.*, Nos. 79 and 152. He speaks of a path existing over No. 320 but he does not speak of that being treated by the parties as a public path.

On this review of the evidence I am definitely of opinion that there was no reliable proof before the Magistrate that any *public* right of way had arisen over the land in question by dedication to the general public. Indeed, the Magistrate seems to have had doubts in the matter, to judge from the following naive remark which occurs in his judgment. Dealing with the fact that the land (No. 320) was recorded as "*banjar*" at the time of partition, he says:—

"This may be no wonder, as every one might have thought of utilizing his share of the village paths in other ways when opportunity arose, as they were better shown as 'banjar' lands."

It appears to me that the fact that there is *no record* in the settlement or village papers of any public right of way over this land, and the further fact that the land was dealt with at partition in a manner quite inconsistent with the existence of

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any such right, definitely refute the case put forward on behalf of the complainant and dispose of the evidence which was led in support of it.

We have here no case of a complaint made by one of the general public alleging the violation of a public right of way. The complainant is a zamindar; the opposite party is also a co-sharer in the village and the complainant's house, and everything about the case suggests the conclusion that what was brought before the court was nothing more than a squabble about a private right of way. Disputes of this nature are not to be decided in the criminal courts.

For the above reasons I hold that the Sessions Judge's recommendation should be accepted and the order of the Magistrate discharged.

DANIELS, J.: This is a reference by the learned Sessions Judge of Azamgarh, on an application by Abdul Wahid Khan, asking this Court to set aside in revision an order passed against the applicant under section 137 of the Code of Criminal Procedure. The order relates to an alleged *kachcha* road in the village of Sidhari, close to Azamgarh, connecting the Muhammadabad and the Gherapur roads and passing close to the houses of the parties.

On a conditional order being made against the applicant under section 133 of the Code of Criminal Procedure, he appeared to show cause against it and pleaded:

Firstly, that the drain in question was fifteen or sixteen years old and did not cause any inconvenience to anybody, and, secondly, that the portion of the alleged road over which it had been built was his private property, it was exclusively assigned to him at a partition in 1912, and that there was no public right of way over it. The learned Sessions Judge was of opinion that the moment a *bonâ fide* dispute as to title was raised by the defendant, the jurisdiction of the Magistrate was ousted and the Magistrate was bound to stop the proceedings and to refer the parties to a civil suit. That view is supported by a ruling of a Judge of this Court in *Dewan* v. *Dost Muhammad* (1). That ruling has recently been dissented from by a Full Bench of the Calcutta High Court in *Ram Sagar Mandal* v. *Alek Naskar* (2), and, in our opinion, it is incorrect. No such limitation on the jurisdiction of the

(1) (1905) I. L. R., 28 All., 98.
(2) (1922) I. L. R., 49 Calc., 682.

Magistrate is to be found in the language of the Code. On objection being taken by the defendant under section 145 (*b*), the Magistrate was entitled to decide whether his conditional order was reasonable and proper or not, that is to say, he had to decide whether the defendant had unlawfully obstructed a way which is or may be lawfully used by the public.

Although he considered that the learned Magistrate had no jurisdiction to decide the point, the learned Sessions Judge went on to consider the case on the merits, and has held that the Magistrate came to a wrong conclusion on the evidence and that there was no public right of way over the land in dispute. The principles by which the Court is guided in cases of revision are well established and it would not be necessary to refer to them, but they have been to some extent questioned in the course of the argument. A High Court undoubtedly has jurisdiction to entertain a revision on grounds of fact, but it is equally well established that this power should be very sparingly exercised. There is a well-marked distinction between an application in revision and an appeal. It would be futile for the legislature to grant the right of appeal in some cases and to withhold it in others, if the High Court under the guise of a revision were to allow conclusions of fact based on evidence to be canvassed and attacked, on the footing of an appeal. Broadly speaking, the rule is that the High Court will only entertain a revision on facts where either there is no evidence to support the finding or where the finding arrived at is perverse or such as no reasonable man could have arrived at on the evidence produced. The case-law on the subject is collected in Sohoni's Criminal Procedure Code, but the gist of the matter was admirably put by Prideaux, J., in *Ahsanullah Khan* v. *Mansukh Ram* (1):

> "The revisional jurisdiction of this Court can always be exercised in order to prevent a gross and palpable failure of justice. At the same time it should not be so exercised as to make one portion of the Code of Criminal Procedure conflict with another, as would be the case were this Court to permit the practice to grow up of invoking its interference in revision so as to give a right of appeal where such right is definitely excluded by other provisions of the Code of Criminal Procedure."

In this respect there is no difference between a reference and a revision. A person invoking the revisional jurisdiction of the Court is bound, according to the practice of the Court, to apply first to the Sessions Judge or District Magistrate. If

(1) (1914) I. L. R., 36 All., 403 (405).

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the latter considers that a case for revision is made out, he reports the matter to the High Court, under section 438 of the Code of Criminal Procedure, with a view to the High Court exercising its revisional powers under section 439. If the Sessions Judge or District Magistrate considers that the application should not be entertained, he rejects it, leaving the aggrieved party to apply to the High Court direct. Section 439 makes no distinction between the two cases.

The Magistrate has used in the course of his order some loose expressions which are criticized by the learned Sessions Judge, but his substantial finding is that—

"It cannot but be concluded that these *banjar* portions of No. 320 (the plot in dispute) were recorded all through as public passage and not private and reserved."

Naturally a village by-road of this kind would only be used by persons living in the village or by persons having occasion to visit the village, but the Magistrate does distinctly find that there is a public right of way over the road in question which has been obstructed by the defendant. The defendant's plea that the drain had been in existence for twelve or fifteen years has been found to be, and undoubtedly was, false. The parties, who are next door neighbours and near relations, have fallen out, and the drain has been recently dug for the express purpose of blocking the right of way which previously existed. The oral evidence strongly supports the conclusion at which the Magistrate has arrived. Apart from the complainant himself, and witness Sadaqdad Singh, who may be attacked as having had some litigation with the defendant's mother, who state in particular that the road in question is used by people carrying dead bodies to the burning ghat and by *ekkas*, tumtums and carts, the complainant has called the patwari of the village, the Secretary of the Municipal Board, and a veterinary assistant. The patwari distinctly deposes that the road is a public way used by people generally and by *ekkas* and carriages and that he has seen it so used during the last thirty or thirty-five years.

The Secretary of the Municipal Board describes it as a *kachcha* road connecting the Ghozipur and the Muhammadabad *pacca* roads, and states that he has often passed over it in an *ekka* or hackney carriage, either to go to the house of the complainant or the house of another man named Abdul Aziz Khan, these being the only houses in the village which

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he happens to have occasion to visit. This witness is a man of position who is not likely to have given false evidence, and the mere fact that he visited the complainant's house is no reason for rejecting his evidence as false. M. Roshan Khan, the veterinary assistant, Azamgarh, gives similar evidence and says that he has used the road not only to visit the complainant but to visit the bungalow of Munshi Muhammad Idris who is said to be a Deputy Collector living at Sidhari. The evidence called for the defence does not rebut this case; indeed, it contains a good deal to support it. These witnesses put forward the false story of the drain having been in existence for ten or fifteen years, but the very first witness admits that all the Babus, *i.e.*, the zamindars, and other persons go *vid* that path. In fact the main burden of his evidence was that the drain was old and did not constitute an obstruction. The defendant has in fact not relied on his oral evidence in this Court. He relies entirely on the fact that the plot in suit was not shown as road but as waste land at the settlement, and that it was divided between the different co-sharers at the partition. The former fact is not conclusive, and as to the latter the *amin* who carried out the partition has been called and he deposes that all the public paths of the village were divided up between the co-sharers at the partition. It appears to me, therefore, that this is emphatically not a case in which this Court would be justified in interfering in revision on the facts, and I would reject the application.

A difference of opinion having arisen between the learned Judges of the Bench, the case was laid before MR. JUSTICE WALSH, who made the following order on the 21st of May, 1923.

WALSH, J.:—In this case a Magistrate, on the complaint of one Abdullah Khan, has ordered his neighbour, one Abdul Wahid, to remove a mud fence, to wit, a drain dug in an alleged public road in front of the latter's house so as to obstruct the passage of the public and of the complainant. The order was made under section 133 of the Code of Criminal Procedure. An application in revision was made to the Sessions Court of Azamgarh. The Sessions Judge is free of opinion that in substance there was no evidence upon which it could properly be held that the road was a public way, and that it was an abuse of the process of the court to attempt to

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put the powers under this section in motion at all, referred the matter to the High Court. MR. JUSTICE DANIELS, before whom it came, referred it to a Bench of two Judges; in due course, it came before MR. JUSTICE LINDSAY and MR. JUSTICE DANIELS, and a difference of opinion has arisen both as to whether it could properly be held, on the evidence, to be a public road, and, further, whether, even on the view of the Magistrate to be erroneous, it was not a merely debatable question of fact, with the decision of which this Court ought not, following the well established practice, to refuse to interfere.

In my opinion, there is, upon the evidence, no real controversy of fact at all, except in so far as the question whether an inference of prior dedication to be drawn from an admitted state of facts may be said to be itself a question of fact. It is, perhaps, more properly described as a mixed question of fact and law. It will, therefore, be convenient to set out the history of this way as disclosed by the evidence.

The way is *kachcha*. It has never been properly made up, and it has certainly never been repaired by any public authority, even if any kind of road repair has ever been done to it. It forms a kind of irregular or tortuous base to a triangle, the sides of which consist of two *pucca* roads which may be described as main roads, and which are undoubtedly roads vested in the district authority. The apex of the triangle is formed by the junction of these two main roads where they intersect at right angles. It might be described as a short cut, or loop, connecting the two roads, and cutting off the two sides of the triangle. But its construction and course, as well as the absence of any work of repair to it by the road authority, all show that it was not brought into existence to serve this purpose. It passes the houses of the complainant and defendant, who were formerly co-sharers. It clearly came into existence as a village by-road or path, for the use and benefit of the persons owning, or occupying, or wishing to visit, the houses and lands which it feeds. The uncontradicted evidence, for example, that of a Secretary to a Municipal Board, and of a Veterinary Surgeon, shows that it has been used indifferently by members of the public visiting the places of persons living on the road, without objection though this user must in the nature of things have been quite casual and intermittent.

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This sort of user is a common incident in the case of all private roads which serve some purpose other than purposes exclusively those of the owner, who would not be likely to interfere, even if he knew of it, if it did not seriously affect his own interests, and it certainly cannot, *sua vi*, be treated as a ground for converting a private way, if it is one, into a public way. The *patwari* has known and used this road for many years, and is quite satisfied that it is public. But it would be unreasonable to expect, in the case of such an obvious local convenience the use of which created no nuisance, a village owner to make himself generally unpopular by interference with every isolated user of this kind or with user by villagers. It is equally true that if he wished to interfere, he might find the labour of doing so a greater burden than the maintenance of his right was worth, and so be persuaded to let the latter go, and throw the road definitely open to the public by a tacit dedication. In England landowners were very fond of doing this in order to throw the burden of repair on to the rates, until the Highways Act of 1835 intervened, and prevented automatic dedication without certain formalities, which included the consent of the road authority and their right to require the road to be properly made up first.

It, therefore, becomes material to inquire when, and in what way, the act of dedication, other than that to be inferred from subsequent permissive user, is said to have taken place, and what evidence of it is to be found in the documents. It is to be observed that originally, before partition, the land was held jointly by co-sharers. This fact makes the necessity of inquiring when the dedication was made, all the more material. It was admitted in argument before me that it could not be suggested that it had been made since the partition. But one co-sharer of an undivided share cannot dedicate to the public a way over the common estate without the consent of his co-owners. The act must be the concerted act, at one given moment, of all the joint owners. It is said that the [illegible] and himself, who must be taken to be either one of the original dedicators, or the successor in title, did not venture to [illegible] the court in this matter by exp[illegible] how it happened. Indeed, the language of his record [illegible] indicated (though it would be unduly hard to infer much from this fact), that he regarded the way as appurtenant to his own [illegible] and the [illegible]

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mainly for those who came there. Neither the judgment of the Magistrate, nor that of MR. JUSTICE DANIELS, contains any finding as to the actual dedication. The truth is, that not only is there no evidence of a joint dedication, but that such evidence as there is, is inconsistent with it. At the settlement in 1901 the plot or soil over which the way passes was described as "waste," or "fallow," and not as "rasta." By the partition in 1910 all village paths remained joint, and were allotted to those who had jointly held the lands over which such ways passed. This was a just and almost inevitable proceeding, and in the absence of clear evidence of a prior dedication is really fatal to this claim. I come, therefore, to the conclusion that, upon the admitted and uncontradicted facts of the case as presented in evidence by both sides, it was only the foolish and dishonest [illegible] by the defence that the drain itself was oddly, a Judge would have to direct a jury that there was no evidence upon which they could find that there had ever been a dedication, and that a finding in the affirmative would really be perverse.

As to the question of jurisdiction my brothers are agreed, and perhaps it does not fall to me to express any opinion. But the whole case is before me, and I will merely content myself with saying that I agree that the Magistrate had [illegible] The fallacy in *Emperor* v. *Dost Muhammad* (1) lies in the confusion between jurisdiction and discretion, which latter was the second point left more or less open by the Full Bench in *Ram Sagar Mandal* v. *Hafiz Nashar Ali* (2). The section is quite plain. The Magistrate must deal with an alleged "public" way even though it is disputed. But it is obvious that these summary powers were primarily intended to be exercised in cases where there was no question that the way was one vested in the public, and when that question is seriously disputed, and its decision becomes a difficult matter of mixed fact and law, a Magistrate clearly has jurisdiction to exercise his discretion by declining to decide it, and sending the parties to a civil court. It is impossible to peruse the judgment of the Magistrate in this case without realizing that he failed to appreciate the principle of law underlying a controversy of this kind. You cannot convert private property into public, merely because it looks as though it ought to be, and because to do so

(1) (1905) I. L. R., 28 All., 98.
(2) (1922) I. L. R., 49 Calc., 689.

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would be convenient to a section of the public who have enjoyed permissive user over it, and I agree with the Sessions Judge that the Magistrate ought in this case to have declined to decide it.

Finally, I hold that in finding that this was a public way the Magistrate misdirected himself, and did so without any evidence to justify such a finding; that the complaint, whatever trespass the act committed upon the complainant's joint rights over the private way may have amounted to, which is a matter for a civil court, was an abuse of section 133 of the Code of Criminal Procedure; and that the reference must be accepted, and the whole proceedings set aside.

Reference accepted.

APPELLATE CIVIL.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Piggott.

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May, 25

HAJI ALI KHAN (OBJECTOR) v. SUJAN KUNWAR (PETITIONER).*

Civil Procedure Code, section 110. Application for leave to appeal to His Majesty in Council. "Substantial question of law."

In an application for leave to appeal to His Majesty in Council two pleas were taken: (1) that the High Court was wrong in deciding that the suit was not barred by reason of a previous suit in part matter brought by the predecessor in interest of the plaintiff having abated, the decision of the High Court being that the previous suit had not abated, and (2) that the courts below were wrong in allowing the plaintiff, who was a Hindu widow, to carry on the suit in her own name, after having obtained a decree upon the strength of an agreement between the widow and the reversioner conferring upon the widow the right of maintaining the suit until the adopted son attained his majority.

Held that neither of these pleas involved any substantial question of law of general importance within the meaning of section 110 of the Code of Civil Procedure.

THE facts of this case sufficiently appear from the judgment of the Court.

Maulvi *Haidar Mehdi*, for the applicant.

Babu *Piari Lal Banerji* and Pandit *Uma Shankar Bajpai* for the respondent.

MEARS, C. J., and PIGGOTT, J.: The question for decision is whether we can or ought to certify that the appeal proposed to be preferred by the petitioner for leave to appeal against a decision of this Court, dated the 3rd of April, 1923, satisfies the conditions laid down by section 110 of the Code of Civil Procedure, so as to make it a proper case for an appeal to

* Application No. [illegible] of 1923 for leave to appeal to His Majesty in Council.

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His Majesty in Council. As regards the value of the subject-matter in dispute [illegible] we are satisfied that the requirements of clause (a) are fulfilled. It is, however, also admitted that inasmuch as this Court affirmed the decision of the court below, the appeal must involve some substantial question of law before we can certify it as a suitable appeal to be preferred to His Majesty in Council. We had to deal, in substance, with two points, and the petition laid before us to-day shows that these are the points which it is desired to raise before His Majesty in Council. Neither of these points has anything whatever to do with the merits of the case. They were both of them objections of a highly technical character, not affecting the right of the plaintiff in the action to recover the money claimed, but only the procedure adopted in the course of the action for its recovery. One contention was that the suit was not maintainable, because a previous action commenced by the predecessor in interest of the plaintiff had abated under order XXII, rule 9, of the Code of Civil Procedure. We disposed of this technical objection by an argument, also technical in its nature, the effect of which was that it was quite impossible to hold that the previous suit referred to in the pleadings had "abated" within the meaning of the rule in question. We are in no way prepared to certify that the question thus decided by us was a substantial question of law within the meaning of section 110 of the Code of Civil Procedure.

The other point requires to be stated in some further detail. The suit was instituted by Rani Sujan Kunwar as a Hindu widow in possession of the estate of her late husband. During the pendency of the action she adopted a son. At some stage or other in the course of the trial the question was raised whether, after this adoption, it was not incumbent upon the lady to bring upon the record as plaintiff in the suit the name of the minor boy whom she had adopted, and then to continue the action as his next friend or natural guardian. This contention was repelled by the trial court. We pointed out, when it was raised before us in appeal, that it would have been open to the trial court to accept the contention and to meet it by a formal order bringing the minor in question on to the record. At the same time, having regard to certain facts which were proved at the trial as to the circumstances under which the adoption was effected, we found that the court below had not been wrong in the procedure actually adopted

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by it, that is to say, in permitting the widow lady to continue the action in her own name. There was at the time of the adoption an agreement between the lady herself and the father of the boy who was given and taken in adoption, the effect of which was to vest the management, at any rate, of the estate in the hands of the lady until the boy should attain majority. It is now contended before us that a substantial question of law is here involved, because of the general principle of Hindu law by which a widow, making an adoption to her deceased husband, at once divests herself of the estate in favour of the son so adopted. Our attention has been drawn to certain cases in which the question has been considered whether an agreement entered into at the time of the adoption, the object of which is to postpone its effect until the death of the widow, would be valid or enforceable as against the adopted son. In the case before us the validity of the agreement is not being contested, and so far as we know has never been contested, by the adopted son. It is the plaintiff in the action, that is to say the widow, who is seeking to protect the rights of the minor by continuing this action for his benefit. She instituted it at a time when she herself represented the estate of her late husband. She has been permitted to continue it on the *strength* of the authority exercisable by her under the agreement entered into at the time of the adoption. We are not prepared to certify that any substantial question of law of general importance is involved in our decision on this point.

The application is dismissed with costs.

Application dismissed.

APPELLATE CIVIL.

Before Mr. Justice Eyres and Mr. Justice Daniels.

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NASIR KHAN (OBJECTOR) *v.* TIWARI AND OTHERS (DECREE-HOLDERS).*

Appeal—Dismissal of an appeal on the merits when it should have been dismissed for default of appearance—Right of further appeal.

The right of appeal does not depend on what a court ought to have done but on what it actually did.

Where, therefore, a court dismisses an appeal categorically "on the merits," an appeal will lie, although the court could in the circumstances to

* Second Appeal No. 372 of 1923, from a decree of R. C. Forbes, District Judge of Farrukhabad, dated the 13th of October, 1922, confirming a decree of Gauri Prasad, Officiating Subordinate Judge of Farrukhabad, dated the 1st of April, 1922.

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have dismissed it, not on the merits, but for default of appearance by the appellant. *Muhammad* v. *Mangarikrama* (1), followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *A. Sanyal*, for the appellant.

Babu *Piari Lal Banerji*, for the respondents.

RYVES and DANIELS, JJ. The appellant before us was the judgment-debtor, and on an application being made to execute the decree against him, he objected that the application was time-barred. The trial court dismissed the objection. The objector appealed and on the date fixed for the hearing of the appeal failed to put in an appearance, and he was not represented by counsel. The learned District Judge recorded the following order:—

"Court-fee for the appellant is absent. Appellant in person absent. His brother, on a pursis, [illegible] applies for an adjournment. I see no good reason to grant this. Plaint does not seem to me to be the best of pursis. Appeal dismissed [illegible] for the subordinate Judge for holding that the application of the decree-holder [illegible] for execution was in time and not time-barred, are read and [illegible] dismiss that appeal, with costs, on the merits."

The appellant comes here in second appeal and urges that under order XLI, rule 17, the learned District Judge should not have dismissed the appeal on the merits, but should either have allowed an adjournment or should have dismissed it for default. This point was considered recently in the Madras High Court, in *Muhammad* v. *Mangarikrama* (1), and we entirely agree with that decision.

A preliminary objection is taken that no appeal lies, on the ground that on the appellant's own showing the court below had no jurisdiction to pass the order which it did pass. The form which the argument takes is this. The only order which the court below had jurisdiction to pass was an order dismissing the appeal for default. The order under appeal must, therefore, be treated as an order dismissing the appeal for default, since this is the only order the court below could legally pass. From such an order no appeal lies.

The argument is ingenious but unsound. The right of appeal does not depend on what the court ought to have done but on what it actually did. What it actually did was to pass a decree on the merits. Against such a decree the law allows an appeal. When the appeal comes up for decision, the appellate court has then to decide whether the order passed was a

(1) (1922) I. L. R., 45 Mad., 852.

proper order and one which the court below had jurisdiction to pass. If it decides this question in the negative, it will set the order aside. The respondent's reasoning would deprive the aggrieved party of the right of appeal just in those cases in which it is most needed. The respondent relies in support of his argument on two old cases, *Kaushi Lal* v. *Naubat Rai* (1) and *Krishna Ram* v. *Govind Prasad* (2). Those were decisions under the old Act, the language of which is different from that of the present Code. But if there is anything in these cases to support the position taken up by the respondent, we are unable to follow them. The result is that we allow the appeal. The question involved is one of law and we should have been prepared to dispose of it ourselves, but all the documents which have been relied on by the court of first instance are not before us. We, therefore, allow the appeal and pass the order which we think the court below should have passed, that is, to dismiss the appeal to the court below for default. If the appellant wishes to restore the appeal, he must apply to the court below and satisfy that court that the appeal should be restored. We make no order as to costs.

Appeal allowed.

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NASIR KHAN v. UMAMI.

REVISIONAL CRIMINAL.

Before Mr. Justice Daniels.

1923 May, 31.

EMPEROR *v.* SITA RAM AND OTHERS.*

Act No. III of 1867 (Public Gambling Act), section 3, 5 and 6—Common gaming house—House searched under a warrant duly issued—Presumption.

Where a house is searched on the authority of a warrant duly issued under section 5 of the Public Gambling Act, 1867, and sundry persons found going out of the house and in the rooms of which are also found thirteen, the presumption provided by section 6 of the Act applies and the persons with the exception of direct evidence that the gambling was being carried on for the profit of the keeper of the house, and all persons found present are liable to conviction under section 3. *Jawahir Ram* v. *Emperor* (3), distinguished.

This was an application in revision against certain convictions and sentences under section 3 of Act No. III of 1867.

* Criminal Revision No. 921 of 1923, from an order of F. D. Simpson, Sessions Judge of Saharanpur, dated the 29th of November, 1922.

(1) (1884) I. L. R., 3 All., 439.

(2) (1878) I. L. R., 2 All., 39.

(3) (1922) 20 A. L. J., 218.

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The facts of the case appear from the following judgment by the committing magistrate:—

On the 14th of June, 1932, the kotwal of Saharanpur raided the shops of S[illegible] alias Soorja and two others and seized a number of papers relating to "satta," a form of gambling very much in vogue in this district. The three men were put on their trial jointly, but it was found that their shops are separate and were searched one after the other, hence all the three have been tried separately. Soorja in his statement disclosed the fact that when the police raided his shop there were present at his shop Dunni Chand, Jagmal, Sita Ram and Chammun Lal, but on seeing the police arrive they left his shop. These four men were said to have been gambling at his shop at that time and were accordingly summoned and put on their trial, Soorja for an offence under section 3 of the Gambling Act, namely, of keeping a common gaming house, and Dunni Chand, Jagmal, Sita Ram and Chammun Lal under section 4 for being found in a common gaming house. Under section 10 of the Gambling Act Soorja has been made a witness and his evidence has been recorded on oath. Dunni Chand, Jagmal, Chammun Lal and Sita Ram all plead not guilty and say that owing to enmity Soorja has named them.

Oral evidence for prosecution in this case consists of the sworn testimony of Soorja, the keeper of the gaming house, of Sub-Inspector Khushdil Khan, D.S.P., who conducted the search, and of Muhammad Mohsin, head constable, who is the informer; then there is material evidence in the shape of various sheets of paper which are memoranda of the satta transactions, recovered from the shop of Soorja at the time of search.

It appears that satta gambling has been going on in this city for the last twenty years and is so well established that a street which used to be known as Kalan Bazar and where the majority of satta shops are situated is now called Satta Bazar.

Ordinarily there appear to be two methods in which satta gambling is carried on. One is the monthly satta and the other is daily satta.

In the monthly satta the gamblers stake their money on a figure which is determined by the monthly sales of Government opium in Calcutta. If the sale finishes on that figure or goes up one hundred above that, the man who stakes

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has money on that figure wins. In the daily satta there are two ways of gambling.

Money is staked either on a figure from 1 to 10 or on a figure from 1 to 100 or on both. The wager on a figure from 1 to 10 is called "baraf" or figure satta and that on a figure from 1 to 100 is called "dara satta." In figure satta the gambler on every rupee staked is entitled to get Rs. 9, but has to pay two pice in the rupee to the keeper, for his commission, out of the winning. In dara satta he is entitled to get Rs. 100 on every Re. 1-12 staked, but has to pay a similar commission.

The headquarters of this daily satta are in Hardwar and Jawalapur who draw out a figure every day and communicate it by post or telegram to all the satta keepers in the district. In this case we are concerned with the daily satta alone. We have to see if the shop of Sooja is a common gaming house and then to see whether the four accused Dani Chand, Jagannath, Sita Ram and Chamman Lal were found at the shop playing or gaming with any instrument of gaming or were found there present for the purpose of gaming, whether playing for any money, wager, stake or otherwise.

Common gaming house is defined as "any house, walled enclosure, room or place in which cards, dice, tables or other instruments of gaming are kept or used for the profit or gain of the person owning, occupying, using or keeping such house, enclosure, room or place, whether by way of charge for the use of the instruments of gaming or of the house, enclosure, room or place or otherwise howsoever." Now according to prosecution evidence, when Sooja's shop was searched some purchas or pieces of paper with accounts written on them were recovered. These papers are Exs. 6 to 12; out of these papers Ex. 11 is a slip which relates to the betting which was going on on the day of search. From this it appears that Dani Chand, Sita Ram, Jagannath and Chamman Lal staked various sums on various figures, and Sooja himself staked his money on the figures which are shown in entries which bear nobody's name. It is also clear from the statement of Sooja that these slips of paper, which are memoranda of satta betting, were kept by him for his profit or gain, as he charged commission at the rate of two pice per rupee from the gamblers if they won and pocketed the money of those who lost. Besides this profit there is a saving of one rupee at least on every 1-12 rupees which is the minimum stake on figure from 1 to 10. [illegible]

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the gambler if he takes one rupee on any figure from 1 to 10 is entitled to get Rs. 9 only. Then he is to pay Re. 0-4-0 as commission at the rate of two pice per rupee; thus the total gain to the keeper is always Re. 1-12-0 per transaction. In case of money being not staked on all figures from 1 to 10, the keeper effects an exchange with another keeper so that figures remain unstaked, and then manages to get all figures from 1 to 10 utilized. In case there are more bets than one on any one figure these are either transferred to other keeper by means of exchange or the [illegible] on the one figure, that is Rs. 8-11-0, are divided equally among the players, so that the keeper never suffers a loss. I have taken no rupee a gamble a wager, but the rates are the same [illegible] for any amount staked. The same [illegible] adopted in the case of dara satta. The amount thus obtained by the keeper is utilized partly for his own profit and partly for the use of the house, that is, some [illegible] in entertainment of the boys. Thus the shop of Soorja is a common gaming house in the very sense of the word, and the slips of paper found [illegible] which satta accounts are written are in the nature of notes.

Now it has to be seen if the four accused Chamman Lal, Sita Ram, Dunni Chand and Jagannath were found playing or gaming at the shop of Soorja or not, or were present for the purpose of [illegible].

Muhammad Mohsin, the head constable who was deputed by the kotwal to find out if satta was going on in the bazar before a raid was attempted, he went there and saw Chamman Lal and Jagannath with a number of other people betting at Soorja's shop. Soorja was noting down something on a piece of paper and money was being paid to him. He went to the kotwal and reported the matter, after visiting one or two other shops also. When the kotwal came he started search from Lachhi's shop, again t whom another case is pending; by this time Sita Ram and Dunni Chand had also arrived at Soorja's shop, but the presence of the kotwal in the bazar must have frightened the people and the four of them ran away. Muhammad Mohsin concentrated his attention on Soorja, who was also trying to escape, and on the papers found at Soorja's shop, which afforded an opportunity to the accused to bolt. There can be no doubt that they were found there present for the purpose of gaming, as their names are down in the memoranda of Soorja, Ex. H, and their bets are recorded in it.

[A portion of the judgement which dealt with the evidence of witnesses of character and alibi is omitted.

On the other hand the evidence of the police officers who conducted the search shows clearly that the instruments of gaming were seized from Soorja's house and Soorja has given a very explicit account of how the gambling is going on.

The names of the four accused were not put down by Soorja in order to satisfy his grudge against them, but he wanted to do away with it but was dragged by Mohsin, head constable.

Against Soorja accused the charge of keeping a common gaming house is established, but as he has been pardoned as a witness under section 10 and his confession regarding everything connected with which he was examined, he is not liable to tions under section 11 of the Act. He is acquitted. As to the other four accused, Chand, Sita Ram and in a gamble and gaming is established and under Act they are sentenced to a fine of undergo one month's simple imprisonment each in default of fine, if realized, a sum of Rs. 100 will be paid to the police.

Mr. A. P. Dube, for the applicants.

The Assistant Government Advocate (Mr. for the Crown.

DANIELS, J.:—This is an application the conviction of the applicants under Clause Abkari Act. The police Gamble was going on, the in the premises of certain duly obtained, the provisions Gambling Act therefore applied authority of the warrant was necessary for the gambling was in the house. I have carefully contains no reference to the contained in that

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with the necessity of direct evidence that a commission was being taken by the keeper of the house. The revision accordingly fails and I dismiss it.

MISCELLANEOUS CIVIL.

1923 May, 31.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Piggott.

IN THE MATTER OF THE PETITION OF KASHI NATH AND OTHERS.*

Act No. XVIII of 1879 (Legal Practitioners Act), section 36: Tout—Order of District Judge including names in list of touts—Revision—Exercise of superintendence of High Court—Government of India Act, section 107.

Although the High Court has power, under section 107 of the Government of India Act, to call for and examine the record of any proceeding taken by a District Judge under section 36 of the Legal Practitioners Act, 1879, and thereafter to make such orders or instructions as might appear to be proper, and would hold it a valid ground for interference if the District Judge had disclosed any improper direction of the Act, for example, had included the name of any person on the list of touts merely because he was known as a person of advocating cases, such circumstance would be no ground for the exercise of superintendence conferred upon the Court, and nothing is gained by the precedent, if the Court were to take it upon itself to review the whole of the evidence to consider whether the evidence relied upon by the District Judge in including an individual in the list of touts was or was not sufficient for that which the High Court itself would have drawn the same inference. *In the matter of the petition of Madho Ram* (1), approved.

THIS was an application asking the High Court to revise an order of the District and Sessions Judge of Benares including the names of the applicants in a list of touts published under the provisions of section 36 of the Legal Practitioners Act, 1879. The facts of the case are fully set forth in the order of the Court.

Mr. *J. M. Banerji*, for the applicants.

The Government Advocate (Babu *Lalit Mohan Banerji*), for the opposite party.

MEARS, C. J., and PIGGOTT, J.: We have before us four applications from persons in respect of whom the District Judge of Benares has passed an order under section 36 of the Legal Practitioners Act No. XVIII of 1879, that is to say, the names of each one of these four persons have been put by the District Judge in a list of persons who are proved to his satisfaction, by evidence of general repute or otherwise, habitually to act as touts. The word "tout," we may note, is defined by section 3 of the same Act. In the case of two of the persons concerned, namely, Kashi Nath and Sarju Dat, notice was ordered to issue and the learned Government Advocate has appeared to support the order of the District Judge. The other two applications, namely, those of Abdul Hamid and Sital

* Civil Miscellaneous No. 18 of 1923.

(1) (1899) I. L. R., 21 All., 181.

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Pande, were simply ordered to be laid before this Bench, to be dealt with in such manner as this Court might see fit after hearing arguments in the other two cases. The learned Government Advocate has raised the general question of the right of this Court to interfere in revision with an order passed by the District Judge, or other competent court, under section 36 of Act No. XVIII of 1879. That is a question which has more than once been before this Court, but the standard authority on the subject is the decision of a Bench of two Judges, one of them the then Chief Justice of this Court, passed in *In the matter of the petition of Madho Ram* (1), in the year 1899. We agree with the learned Judges who decided that case that this Court could only interfere with an order, such as that now before us, in the exercise of the general powers of superintendence conferred upon it by what is now section 107 of the Government of India Act. We are satisfied that those powers are extensive enough to authorize this Court in the exercise of its discretion to send for the record of such a proceeding in a subordinate court, namely, the record of an inquiry conducted by a District Judge with a view to drawing up a list of persons proved to be touts, and to examine such record and thereafter issue such orders or instructions to the District Judge as might appear to be proper. The question remains however, what principles this Court should lay down to govern the exercise of its discretion in this matter. The learned Judges who decided *Madho Ram's* case above referred to laid down one principle of considerable importance. This was that this Court would not interfere in the exercise of its powers of superintendence, where the sole ground upon which interference was asked for was that the decision of the District Judge was against the weight of the evidence. We desire to stand by that principle. It is quite clear from the wording of section 36 of Act No. XVIII of 1879 that the Legislature intended to confer upon the courts therein mentioned, including the court of a District Judge, a very wide discretion in the matter. The District Judge is authorized to frame and publish a list of persons proved to his satisfaction, by evidence of general repute or otherwise, habitually to act as touts. It has been pressed upon us that the word "touts," as used in this section, refers back to the definition in the preceding section No. 3 of the same Act. This is undoubtedly so; but what is laid down in section 36 is that the District Judge has discretion to frame and publish

(1) (1899) I. L. R., 21 All., 184.

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a list of persons who are proved to his satisfaction to behave in the manner set forth in the definition of the word "tout" in section 3. The only qualifications imposed by the Act on the exercise of this discretion are that the District Judge must be satisfied by evidence of general report or otherwise, and further that no person's name is to be included in such a list until he has had an opportunity of showing cause against such inclusion. We may say in this connection that we should certainly hold it a valid ground for interference by this Court, in the exercise of its general powers of supervision, if the District Judge had disobeyed this latter direction and had included in his list of touts the name of a person who had never been allowed an opportunity of showing cause against such inclusion. We return now to the obvious fact that it was never the intention of the legislature to allow anything of the nature of an appeal against the decision of a competent court under section 10 of Act No. XVIII of 1879. We cannot allow our general powers of supervision to be invoked so as, in effect, to create a right of appeal which was never intended by the legislature. In the cases now before us it is sought to bring the matter within the scope of the revisional jurisdiction, represented as falling somewhat short of the jurisdiction exercisable by a court of appeal, by representing that the record of the inquiry conducted by the District Judge discloses as against each of the four persons whose petitions lie before us no legal or relevant evidence to warrant the finding arrived at by the District Judge that they habitually do act as touts. The plain fact of the matter is that, as regards each of these four persons, direct evidence was wanting; but there was laid before the District Judge certain circumstantial evidence from which the District Judge drew the inference as against each of these persons that they were habitually acting as touts. In our opinion it would be straining the powers of superintendence conferred on this Court and setting an undesirable precedent, if we were to take it upon ourselves in every instance of this kind to consider whether the circumstantial evidence relied upon by a District Judge, and set forth in his order, was or was not evidence upon which we ourselves would have drawn the same inference. We think the legislature intended that the District Judge should be master in his own court to this extent. The result is that we are not prepared to interfere in any one of the four cases before us, and each of the applications stands dismissed accordingly.

Applications dismissed.

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LALAJI MAL v. RUPJI RAM.

face of it the suit is barred by limitation as it was not filed until the 28th of April, 1922. In order to bring it within limitation, it was pointed out that on [illegible] (by consent of the parties) this receipt seems to have been exhibited and on that occasion, some time in 1920, the defendant had admitted its execution. The court has held that the mere fact that on the back of the note there is in the [illegible] of the defendant the words "execution admitted," and the endorsement of the Munsif showing the date, is a sufficient compliance of the provisions of section 19 of the Indian Limitation Act. It seems to me that the mere fact that in some other case the defendant merely admitted the execution of the document is not an acknowledgment of liability within the meaning of the section. No evidence was taken and there is nothing but the endorsement. In my opinion it has not been shown that the suit was within limitation; it, therefore, should have been dismissed. I accordingly allow this application and set aside the decree of the court below with costs.

Application allowed.

REVISIONAL CRIMINAL.

Before Mr. Justice Daniels.

1923

June, 1.

EMPEROR v. MAHADEO PRASAD AND ANOTHER.*

Act No. VII of 1910 (Indian Forest Act), section 26—Water in municipal pipes—Water, whether subject of theft—Water when severed from the soil—Penal Code (Act XLV of 1860), section 378.

Water when severed in pipes and under the control of persons can be the subject of theft. *Dhanna* v. *Khiroda Chandra Pal* (1), *Cossim Pillai* v. *Emperor* (2), followed. *Emperor* v. *Sheik Jan* (3), referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Satis Nath Mukerji*, for the applicants.

The Assistant Government Advocate (Mr. *R. McCosh*), for the Crown.

DANIELS, J.:—This revision raises the question whether water in municipal pipes can be the subject of theft. The two applicants, Mahadeo Prasad and Beni Prasad, are brothers and live in a house in cantonments, which belongs to Mahadeo Prasad. They employed their younger brother Mangoo, who was a pipe layer overseer in Military Works service, to put a

* Criminal Revision No. 202 of 1923, from an order of R. L. Yorke, Sessions Judge of Allahabad, dated the 12th of December, 1922.

(1) (1883) 11 Q. B. D., 21.
(2) (1912) M. W. N., 119.
(3) (1908) I. L. R., 35 Calc., 437.

Pande, were simply ... dealt with in such ... ing arguments in the ... ment Advocate has ... this Court to interfere ... District Judge, or ... Act No. XVIII of ... than once been ... on the subject is the ... of them the then Chief ... *the matter of the petition* ... We agree with the ... this Court could ... before us, in the ... tendence ... Government ... are ... its discretion ... subordinate ... by a District ... proved to be ... issue such ... appear to be proper. ... principles this Court ... of its discretion ... decided *Madho Ram* ... principle of ... would *not* ... tendence, ... asked for ... the weight ... principle. ... Act No. XVIII of ... upon the ... District ... District ... person ... or ... upon ... be ... Act ... 36 ...

REVISIONAL CIVIL.

Before Mr. Justice Ryves.

LALLU MAL (DEFENDANT) *v.* ROOP RAM (PLAINTIFF).* 1923 May, 31

Act No. IX of 1908 (Indian Limitation Act), s. 18, sch. i, art. 23 — Limitation — Acknowledgment — Admission of execution in course of a former suit not inter partes.

Held that the mere admission, in the course of a previous suit not *inter partes*, of the execution of a document, by way of admission set up by the defendant of the words "execution admitted" on the back of it, without any evidence called as to its execution, does not amount to an acknowledgment of liability in respect of the said document within the meaning of section 18 of the Indian Limitation Act, 1908.

THIS was an application in revision against the decree of a court of Small Causes. The facts of the case sufficiently appear from the judgment of the Court.

Pandit *Madan Mohan Nath Raina*, for the applicant.

Munshi *Durga Prasad*, for the opposite party.

RYVES, *J.*: This is a civil revision from a decree of the court of Small Causes. The suit was based on a promissory note executed by the defendant on the 16th of April, 1919. The suit was filed on the 28th of April, 1922. The defendant put in a written statement, the second paragraph of which runs as follows: "The plaintiff (who is a Jotshi) led the defendant to believe that he would perform adequate *puja* which would have the effect of saving the lives of his children and they would survive the age of one year, and for this the defendant agreed to pay Rs. 30 to the plaintiff, out of which Rs. 8 was paid in cash and the balance was payable after the child had survived the age of one year. It was on this understanding that the promissory note was written. The child died within a year of its birth and hence nothing was payable." The other ground taken was that the suit was barred by limitation. It appears from the record that five witnesses on behalf of the defendant were present but, as a matter of fact, the court did not take their evidence, holding that it was not open to the defendant who admitted the execution of the promissory note to plead want of consideration, and reliance was placed on *Sri Ram v. Sobha Ram Gopal Rai* (1). I do not think that ruling is applicable in this case. I think under the 3rd proviso to section 92 of the Indian Evidence Act the court should have allowed evidence to be taken on this point. But it is unnecessary to decide this, as I hold against the plaintiff on the second point. On the

* Civil Revision No. 41 of 1923.

(1) (1922) I. L. R., 44 All., 521.

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water connection from the main water pipe into their house. Thus was done contrary to law, without the permission of, and indeed without the knowledge of, the cantonment authority and the Municipal Board. The tap being in the house, no one has actually seen them taking water from it, but the courts below were quite justified in inferring that they had not gone to the trouble and expense of putting in this connection, and having it in their house for a month and a half, without making use of it and taking water from it. Had they applied for permission to put in a tap in accordance with the rules, they could have got permission, but they would then have had to pay water rate which they were trying to escape paying by these surreptitious procedure. They might have been convicted under the appropriate section of the Water Works Act or of the Municipalities Act or Cantonment Code, but the authorities, considering the offence as a serious one, preferred to charge them with theft of water under section 379 of the Indian Penal Code, and on this charge they have been convicted and sentenced to a fine of Rs. 300 each. The convictions and the sentences have been upheld by the learned Sessions Judge in appeal.

It has been held both in England and in India that water when conveyed in pipes and so reduced into possession can be the subject of theft. The English case is that of *Ferens* v. *O'Brien* (1). There water was conveyed to a colliery by means of underground pipes and then supplied to the houses of the workmen by means of branch pipes to which taps were attached, the workmen being allowed to take water from taps on payment of a fixed price. The accused was seen taking water from one of the taps without having agreed to pay for it. It was held that, under the circumstances, he could be convicted of larceny at common law for taking this water.

In the Calcutta case of *Emperor* v. *Shaikh Arif* (2) it was held that water flowing in an open, though an artificial, channel could not be the subject of theft, and *Ferens* v. *O'Brien* (1) was distinguished on the ground that in the latter case the water was confined in pipes and thereby reduced into the possession of the water company which supplied it.

Chockalingam Pillai v. *Emperor* (3) was a case in which the water had been cut off from the natural source and conveyed

(1) (1883) 11 Q. B. D., 21.
(2) (1898) I. L. R., 25 Calc., 437.
(3) (1912) M. W. N., 119

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through pipes, and thus reduced into effective possession. It was held, both with reference to the English authority and to the definition of theft contained in section 378 of the Indian Penal Code, that it could be the subject of theft.

The present case is even stronger against the accused inasmuch as the water had not only been purified, filtered and conveyed through pipes by the Municipal Board but was then, as I am informed at the bar, sold by the Municipal Board to the cantonment authority, for supply to persons in cantonments, at a price depending on the amount of water supplied.

After considering the authorities, I am of opinion that the water in this case was in the possession of the cantonment authority and that the accused's act in taking it comes within the definition of theft.

I have also been asked to interfere on the ground that the sentences were excessive, but in the judgment of the lower court it is expressly stated that no plea on the question of sentence was urged in that court. The applicants are, therefore, not entitled to urge in revision that the sentences are too severe. I accordingly dismiss the application of both accused.

Application dismissed.

APPELLATE CIVIL.

Before Mr. Justice Ryves and Mr. Justice Pollock.

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June, 1.

MUHAMMAD ZAIN KHAN AND ANOTHER (PLAINTIFFS) v. NURUL HASAN KHAN AND ANOTHER (DEFENDANTS).*

Muhammadan Law—Wakf—Reservation of benefit by wakif—Wakf remaining an executory bequest—Wakf not void.

Held that if a *wakif*, having executed a deed of endowment, remains in possession of the dedicated property as *mutawalli*, under an express declaration that he is a *mutawalli* and not an owner, the *wakf* is not thereby rendered invalid. *Abdul Jalil Khan* v. *Abdul Wali Khan* (1), referred to.

Held also that, so long as there is an ultimate dedication of the entire property to genuine religious and charitable uses, the fact that the *wakif* reserves to himself a life interest in the income of the property dedicated does not invalidate the *wakf*. *Jiwan Peshar* v. *Vedabhai Parbhai* (2), *Cassumally Jairajbhai Peerbhai* v. *Sir Currimbhoy Ebrahim* (3), *Bibi Mir* v. *Shaik Lal Peshkar* (4), and *Mahomed Ashanulla Chowdhry* v. *Amirchand Kundu* (5), referred to.

* Second Appeal No. 467 of 1922, from a decree of Baijnath Das, Additional Judge of Cawnpore, dated the 4th of January, 1922, reversing a decree of Kasha Prasad, Munsif-magistrate of Cawnpore, dated the 8th of September, 1920.

(1) (1921) I. L. R., 43 All., 116.
(2) (1879) I. Bombay, 515.
(3) (1911) I. L. R., 36 Bom., 214.
(4) (1882) I. L. R., 9 Calc., 116.
(5) (1880) I. L. R., 17 Calc., 998.

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MUHAMMAD ZAIN KHAN v. NAWAB HASAN KHAN

Dr. *Kailas Nath Katju*, for the appellants.

Maulvi *Iqbal Ahmad* and the Hon'ble Saiyid *Raza Ali*, for the respondents.

REVES and DANIELS, JJ. :—The question for decision in these two connected appeals is as to the validity of a deed of waqf executed by Abdul Ali Khan and his wife on the 26th of March, 1909. Abdul Ali Khan died on the 7th of May, 1917, and his wife shortly afterwards, and the present suit was brought by his brother Muhammad Ali Khan claiming possession of his legal share of the property as his heir under Muhammadan Law. Muhammad Ali Khan has died during the pendency of the proceedings and the appellants are his legal representatives. The parties to the suit are Sunnis. Muhammad Ali Khan in his plaint denied that any waqf was ever dedicated and urged further that if there was a waqf it was fictitious and illusory. That a waqfnama was executed has never been seriously disputed. The trial court, however, treated it as a waqf which would not really take effect until after the deaths of Abdul Ali Khan and his wife. It accordingly treated it as valid only to the extent of one-third of the property covered by it and decreed the suit as to the remainder. The learned Additional Judge, however, has upheld the waqf as valid and dismissed the suit. His findings are :

(1) That the dedication was substantial and real.

(2) That the dedication of the corpus was absolute and immediate.

(3) That the reservation of a life-interest in the income, even if it were the entire income, which it is not, limited to the life of the two settlors does not render the waqf illusory and testamentary.

The third finding is one of law. The first two findings are findings of fact, except in so far as the reality of the dedication may be a matter of legal inference from the facts found. The points which are taken in this court are two : (1) That the waqf was invalid for want of delivery of possession; and (2) that the settlor and his wife retained complete control over the income during their joint lives and that this renders the waqf illusory and invalid, either altogether, or in the alternative, as held by the trial court, for the period of their lives.

The only ground on which the waqf is assailed under the first head is that no application for mutation of names was made by Abdul Ali Khan, though he lived for eight years after the execution of the deed of waqf. On the other hand, it is

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proved that under the deed of waqf he appointed himself as first *mutawalli* and expressly declared that he was holding the property henceforth as *mutawalli* and not as owner. Thus, according to the accepted rule of Muhammadan Law, is sufficient, and it was so held by this Court in *Abdul Jalil Khan* v. *Obedullah Khan* (1). This ground of attack, therefore, fails.

As regards the second plea, the suggestion that the waqf can be treated as a testamentary waqf may be rejected at the outset. A will is a document which may be cancelled by the testator at any time up to his death and only comes into operation at the latter event. Here there was an irrevocable dedication of the corpus of the property from the date of the deed. The provisions of the deed which are relied on as showing that the dedication was illusory are set out in the judgment of the trial court. They amount to this, that during the life-time of the settlor and his wife the amount to be spent on charitable and pious purposes was left entirely to their discretion both as to the sum to be expended and as to the purposes for which it was to be spent. They were to spend as much of the profits as they deemed proper on charitable and pious purposes recognized by Muhammadan Law and the remainder for their support, and no one was to have the right to call them to account. This state of things was, however, confined entirely to the life-time of Abdul Ali Khan and his wife. It is not disputed that after their death the objects of the waqf were carefully specified and were proper objects, and that the *mutawalli* was directly bound to spend the money on those objects. The question is, therefore, substantially that stated by the learned Additional Judge, namely whether the reservation of what practically amounts to a life-interest in the income, as distinct from the corpus, is sufficient to invalidate the waqf. This question was first raised in the case of *Jaun Beebee* v. *Abdollah Barber* (2). In that case five questions were referred to the maulvis for decision. The first question was :—

"Whether according to Muhammadan Law, an endowment to charitable uses is valid, when qualified by a reservation of the rents and profits to the donor himself during his life?"

The maulvis alluded to the difference of opinion between the Imam Muhammad and the Imam Abu Yusuf on this point and agreed that the opinions of most of the learned upheld the view of Abu Yusuf who considered the waqf legal. Judgment

(1) (1921) I. L. R., 43 All., 416.
(2) (1898) I Fulton, 345.

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was given accordingly. The same view was taken by the Bombay High Court in the case of *Cassamally Jairajbhai Peerbhai* v. *Sir Currimbhoy Ebrahim* (1). It was suggested that *Jaun Beebee's* case had been dissented from in the Full Bench case of *Bikani Mia* v *Shuk Lal Poddar* (2), but this is not the case. The judgment was cited at some length by GHOSE, J. (pp. 185-188) and also by TREVELYAN, J. (p. 223 of the report), and was distinguished from the case before them, but neither of the Judges pronounced it to be incorrect.

The appellants have also referred to the Privy Council ruling in *Mahomed Ahsanulla Chowdhry* v. *Amarchand Kundu* (3). This ruling is in no way contrary to the view taken by the court below. The test laid down by the Privy Council for the validity of the endowment was that there must be a substantial dedication of the property to charitable uses *at some time or other*. Their Lordships also quote with approval the opinion of KEMP, J., in an earlier case that the mere charge upon the profits of the estate of certain items which must in the course of time necessarily cease, being confined to one family, and which "after the lapse will leave the whole property intact for the original purposes for which the endowment was made, does not render the endowment invalid under the Muhammadan Law."

In this case there was admittedly an ultimate dedication of the entire property to religious and charitable uses. The weight of authority is entirely in favour of the validity of the waqf. We accordingly dismiss both the appeals with costs.

Appeal dismissed.

MISCELLANEOUS CIVIL.

1923

June, 1.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Piggott

SULTAN BAKHSH AND OTHERS (APPLICANTS) v. ABDUL HAMID (OPPOSITE PARTY).*

Municipal elections—Procedure—Withdrawal of candidate during the polling—Duty of returning officer.

A candidate for election as a member of a municipal board can withdraw from his candidature at any time before the election is concluded, and if the withdrawal should take place whilst the polling is actually in progress, it would be the proper course for the returning officer, where there had been only two candidates and one vacancy, to close the poll and to declare the remaining candidate duly elected.

* Civil Miscellaneous No. 217 of 1923.

(1) (1911) I. L. R., 35 Bom., 214

(2) (1892) I. L. R., 20 Calc., 116.

(3) (1889) I. L. R., 17 Calc., 28; L. R., 17 I. A., 28

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SHEO BARAN v. ABDUL HAMID.

THIS was a reference made by the Commissioner of the Allahabad division under order XLVI of the Code of Civil Procedure read with section 23 act of the United Provinces Municipalities Act, 1916, in the matter of a municipal election. The facts out of which the reference arose are fully set forth in the order of the Court

Munshi *Gulzari Lal*, for the applicant

The Hon'ble Saiyid *Ata Ali*, for the opposite party

MEARS, C.J., and PIGGOTT, J.: This is a reference to the High Court under order XLVI of the Code of Civil Procedure read with section 23 act of the Municipalities Act No. II of 1916. In Ward No. 1 of the Fatehgarh municipal elections five candidates were nominated for the Moslem seats. Three of them withdrew before the polling day. On that day two candidates were opposed to each other by name Umrao Khan and Abdul Hamid. There being only one seat, the poll was duly opened and voters commenced to record their votes in favour of one or the other candidate. At some time whilst the polling was open and before any Umrao Khan went to the returning officer and told him that he no longer desired to contest the seat. Thereupon the returning officer closed the poll and declared that the one remaining candidate, Abdul Hamid, was duly elected to the one vacancy. It appeared in the petition that the withdrawal of Umrao Khan was due to some political manœuvre; but be that as it may, we can only deal with what were the facts relating to the election. The fact was that the poll opened with two candidates for one vacancy, and before the time came for the poll to close and votes to be counted and the returning officer to declare who was elected before that time arrived there was only one candidate and that one candidate a candidate for the one vacancy. We think, in the circumstances the returning officer acted with propriety and common sense, and that he acted quite reasonably. Rule 36 (1) of the Municipal rules and by-laws of this municipality provides: "Every poll shall be taken on the day for the election, when the number of duly nominated candidates who are entered in the schedule and who have not withdrawn their candidature before the time fixed for the poll exceeds that of the vacancies." When you have got duly nominated candidates in excess of vacancies, you have got to have an election. Rule 36 (2) provides: "If the number of such candidates is equal to the number of vacancies, all such candidates shall be deemed to be elected. Therefore, if there

are three candidates and three vacancies, all such candidates shall be deemed to be elected: similarly two; similarly one. Now it is true that in terms rule 36 (2) does not contemplate, nor is there anywhere any provision which contemplates, the withdrawal of a candidate during the few hours during which the polling is in progress; but by analogy to the duties of the returning officer before the opening of the poll, we have no doubt that it was the proper course for the returning officer to act in conformity with rule 36 (2), and, on finding only one candidate left for the one vacancy, to declare that man duly elected.

Dr. *Sen*, voicing no doubt to some extent the suggestion thrown out by the Commissioner, said that the poll ought to remain open and in the end the returning officer should declare the remaining candidate duly elected. The difficulty about that is that if the poll remains open, votes are being recorded for a candidate who has withdrawn his candidature and is no longer one of the contestants. It is quite clear that just as a candidate can withdraw before the time for polling arrives, so he can withdraw during the polling, so also can he withdraw as soon as he is elected or he can withdraw at any time after his election. A man does not bind himself that he will not withdraw either as a candidate or as a member of a municipality. He is entitled to withdraw at any moment. In the circumstances we are of opinion that the returning officer acted in the circumstances legally and properly and rightly in accordance with his duties and dealt with the matter in a proper way. We are of opinion that his declaration that Abdul Hamid was duly elected was a proper decision and in accordance with the law. This is our answer to the reference. The costs of this hearing, including fees actually certified by counsel on both sides, will be dealt with by the Commissioner in his discretion in disposing of the election petition.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Colvin.

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SURAJ NARAIN (PETITIONER) *v.* JANG BAHADUR AND OTHERS (OPPOSITE PARTIES).*

Act (Local) No. II of 1916 *(United Provinces Municipalities Act), sections* 19, 20 *and* 22—*Election petition—Presentation—Verification—Who may refer an election petition.*

Held that, where there was evidence of a practice in a particular district whereby petitions intended for the Collector were commonly presented to the Joint Magistrate if the Collector was not in court at the time, and were made over by the Joint Magistrate to the Collector on his arrival, an election

* Civil Miscellaneous No. 211 of 1923.

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petition under section 19 of the United Provinces Municipalities Act, 1916, which was presented to the Joint Magistrate and in fact received the Collector before the period of limitation had expired was properly presented.

Held also, that a person who is about to offer himself as a candidate for a municipal election, was [illegible] the board to allow to withdraw, had no *locus standi* to petition against the election of the successful candidate.

Held further that an election petition under the United Provinces Municipalities Act, 1916, need not be verified in the manner prescribed by the Code of Civil Procedure for the verification of plaints.

THESE were references made by the Commissioner of the Allahabad division in the matter of certain petitions in connection with municipal elections. The facts out of which the references arose sufficiently appear from the order of the Court.

The petitioners were not represented.

Dr. *Kailas Nath Katju*, for the opposite parties.

MEARS, C. J., and PIGGOTT, J.: The municipal elections were held in Cawnpore in March, 1923. Suraj Narain was a candidate, as was also one Muhammad Siddiq Hafiz. Both of these men were defeated by an opponent who secured a larger number of votes. Both of these men thought they had a case for unseating their opponent and each of them proposed to proceed under the Municipalities Act, Local Act No. II of 1916, and lodged petitions. Section 20 prescribes the form and the manner in which the petition shall be presented, and it also defines who are the persons who are permitted by law to present a petition. Section 22 defines who is to hear petitions, and clause (2) of that section lays down how the proceedings may start by presentation.

Taking the case, first of all, of Suraj Narain, Miscellaneous Case No. 211 of 1923, the material dates and facts are as follows: The election was held on the 20th of March, 1923, and on the 23rd of March Suraj Narain attended the court of the Collector. The petition which he had with him was, as regards formal parts, in proper form; that is to say it was headed as being a matter which would be dealt with in the court of the Commissioner (it was stated to be pending) "through the Collector, Cawnpore district" and recited that it was a petition under section 19 of the United Provinces Municipalities Act No. II of 1916. When Suraj Narain reached the court the Collector had not arrived, but the Joint Magistrate was sitting; and the Joint Magistrate, in answer to an inquiry by the petitioner, has recorded in a letter of the 7th of April, that a practice does exist in that court, which undoubtedly is for the convenience of the public, whereby petitions intended for the Collector are received by the Joint Magistrate and made

over to the Collector on his arrival. Suraj Narain, relying upon that practice, in fact handed to the Joint Magistrate the petition, and the Joint Magistrate, in pursuance of that practice, handed over to the Collector the document. That was done on the 23rd of March. So that Suraj Narain, who had originally 15 days within which to deliver to the proper authorities a proper petition, in fact had got that petition into the hands of the proper authority, namely the Collector, by the 23rd of March. It is suggested that we are bound to construe sections 20 and 22 so strictly as to hold that no presentation of a petition can avail the petitioner unless the petitioner himself personally comes face to face personally with the Collector, and delivers it into the Collector's hands. That undoubtedly is the safest and wisest thing to do. But the position as regards the Collector's court at Cawnpore was that in reliance upon the practice Suraj Narain was content to follow that practice of handing documents intended for the Collector to the Joint Magistrate. Inasmuch as the petition reached the Collector well within time, we are of opinion that it was a proper presentation and that the petition ought to have been heard and disposed of upon the merits.

The next case with which we propose to deal is that of Muhammad Siddiq Hafiz because there is some similarity in the facts. We will deal with the case of Durga Shankar later.

The elections for this particular ward in Cawnpore were held on the 19th of March, and that gave Muhammad Siddiq Hafiz up to the 3rd of April within which to be in time for the lodgment of his election petition. Fifteen days is specified by the Act, and the first broad question which appears is, did he by any means whatever get the petition into the hands of the Collector by the 3rd of April? The answer is that he did not do so: and that, in our opinion, makes a material difference in this case. On the 3rd of April, which was the last day, we are told that he presented the petition to a Deputy Collector by name Mr. Ashfaq Husain. There is not in the papers relating to this case any evidence which suggests that there was any practice whereby this Deputy Collector was authorized, or was accustomed, short of actual authorization, to receive petitions of that nature and was a recognized official channel for their transmission to the Collector. That being so, we think that the petitioner in this case took the risk. If it happened that the Deputy Collector had forwarded the document to the Collector within time and the Collector had chosen to accept it from

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the Deputy Collector, that might possibly have been a good presentation. We do not say that it would have been a good presentation, that matter would have to be enquired into with some care and might depend to some extent on whether we believed that there was in existence a recognized [illegible] However we are satisfied that, in the absence of any evidence of that character, the petitioner, when he handed the document to the Deputy Collector who no doubt gave him an assurance that it would be forwarded to the Collector, took the risk of it reaching the Collector within time. It did not reach the Collector within time and was not received by him until the 4th of April. In these circumstances we hold, as regards the petition of Muhammad Siddiq Hafiz, that the petition was not presented within time and is one which should not be entertained.

We now come to the petition of Durga Shankar. He, like Muhammad Siddiq Hafiz, handed the petition to a Deputy Collector, and again there is no evidence on this record that the Deputy Collector was a recognized channel for the transmission of these documents. We need not decide whether that petition was properly presented, for this reason that we are unable to understand how Durga Shankar comes before the court as a petitioner. It appears that he was one of several candidates and that at a meeting it was considered desirable that there should not be so many candidates but that the choice of the two gentlemen who should contest the ward was left to the decision of a panch of high standing, who was regarded by the seven candidates as being likely to make the best selection. Two gentlemen were in fact selected. Durga Shankar was amongst the five whose names were passed over; and he, having the belief that a candidate who was thus declared elected could be unseated on various grounds, conceives that he has a right to come forward and raise that question. These petitions can be lodged by a candidate in whose favour votes have been recorded and who claims in the petition to be declared elected in the room of the person whose election is questioned, that is, a person who went through the contest, in whose favour votes were recorded and who alleges that, after strict scrutiny of votes and striking off the names of people who should not have voted, or by reason perhaps of disqualification of the person who has been elected, he himself will be the person who will become the elected member in the event of the petition being inquired into and upheld. That is the only one

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SURAJ NARAIN v. ASGHAR HUSAIN.

person who can present a petition: but a body of men, ten or more electors, may join together and present a petition. Durga Shankar's position in this case is that he has no *locus standi* in the matter of law, and on that ground was incompetent to present a petition, and on that ground his petition must be rejected.

Mr. Stowell, the Commissioner, also inquires whether a petition must be duly verified in accordance with the rule applicable to plaints. We think not. When the petition has been duly presented, the hearing follows along the lines prescribed for a civil suit. The Act is silent as to the verification of the petition and it is only after due presentation of the petition that the civil suit procedure rules operate. We are therefore of opinion that a petition need not be verified.

REVISIONAL CRIMINAL.

Before Mr. Justice Kanhaiya Lal

1923

June, 6

ABDUL RASHID KHAN *v.* NISAR MUHAMMAD KHAN AND ANOTHER.*

Act No. XIII of 1859 (Workman's Breach of Contract Act), sections 2 and 4 [Breach of contract by workman: Penalty for: against workman compromised and fresh contract entered into, but without fresh advance.

A, having entered into an agreement with *B* under section 2 of the Workman's Breach of Contract Act, 1859, and received from *B* an advance of Rs. 300, broke his agreement. Proceedings were taken against *A* under the Act, but these ended in a compromise, and *A* executed a fresh agreement with *B* in consideration of the original advance.

Held that this second agreement was not unenforceable under the Act because of the fact that no fresh advance was made to *A* directly in connection with it.

THIS was a reference made by the Sessions Judge of Moradabad in a case under Act No. XIII of 1859. The facts out of which the reference arose sufficiently appear from the judgment of the Court.

The applicant was not represented.

The Hon'ble *Saiyid Raza Ali*, for the opposite parties.

KANHAIYA LAL, *J.*:—This is a reference by the Sessions Judge of Moradabad in a case in which the accused Abdul Rashid Khan has been directed to pay Rs. 300 to the complainant, Haji Nisar Muhammad Khan, by certain instalments, under section 2 of Act No. XIII of 1859 as amended by Act No. XII of 1920. It appears that in 1920 Abdul Rashid Khan obtained an advance of Rs. 300 for doing a certain work. He worked for a few months after the execution of the agreement

* Criminal Reference No. 590 of 1923.

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ABDUL FATTU KHAN v. MUHAMMAD KHAN

but failed to complete the [illegible]. He was arrested, and, on being charged with a breach of the contract, executed another agreement in lieu of the former advance to work for another period of one year. Thereupon the [illegible] originally filed against him was withdrawn. After the execution of the second agreement he worked again for a little while and then broke off the [illegible]. The [illegible] thereupon proceeded against him again to enforce his agreement and obtained an order, the correctness of which forms the subject of the reference. The view taken by the learned Sessions Judge is that inasmuch as no advance in cash was made at the time of the second agreement, section 2 of Act No. XIII of 1859 as amended by Act No. XII of 1920 was inapplicable. But the advance may be an advance made at that time for the performance of the engagement or at some time earlier. The new contract entered into under the circumstances above mentioned merely superseded the old contract, and its validity is recognized by section 4 of the Act, which provides that the word "contract" as used therein would include all contracts falling within the meaning of the Indian Contract Act of 1872, except where the period specified for performance exceeds one year. The new contract provided for the performance of the engagement for one year only and was valid and enforceable. The order of the trying Magistrate need not, therefore, be disturbed.

APPELLATE CIVIL.

1923

June, 6

Before Mr. Justice Lindsay and Mr. Justice Niamat Ullah.

INAYAT HABIB AND OTHERS (DEFENDANTS) v. HABIB-UL-LAH (PLAINTIFF) AND BHAWANI PRASAD AND OTHERS (DEFENDANTS).*

Hindu law—Joint Hindu family—Joint family property subject to a mortgage executed on behalf of family—Right of purchaser to plead want or total necessity for the loan—Legal necessity afforded by recital of mortgage deed—Act not operating to the detriment of the family.

It is open to the purchaser from the [illegible] of a joint Hindu family of joint ancestral property which is subject to a mortgage executed ostensibly on behalf of the family, if such mortgage is sought to be enforced against him, to raise the plea that the mortgage was executed without legal necessity. *Muhammad Muzammil-ullah Khan v. Mata Lal* (1), referred to.

Where, however, the vendors admitted on the sale deed that the debts secured by the mortgage were binding on them and the purchaser undertook to pay them off, and where, further, the said mortgage was merely the last item of a long series of successive mortgage transactions, no objection to which had been raised by any member of the family during a very considerable

* First Appeal No. 136 of 1921, from a decree of Ganga Nath, Subordinate Judge of Mainpuri, dated the 20th of June, 1920.

(1) (1911) I. L. R., 33 All., 783.

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INAYAT ILAHI v. HARDEO SAHAI.

period, it was *held* that a very strong presumption was afforded that the debts secured by the various mortgages, ranging from 1873 to 1914, were incurred for legal necessity of the family

THE facts of this case are fully set forth in the judgment of the Court.

Maulvi *Iqbal Ahmad*, for the appellants.

Munshi *Jang Bahadur Lal*, Dr. *Surendra Nath Sen* and Munshi *Shiva Prasad Sinha*, for the respondents.

LINDSAY and SULAIMAN, JJ. :—First Appeals Nos. 136 and 137 of 1921 are connected appeals by certain defendants arising out of two suits for sale on the basis of two mortgage deeds of the same date, namely, the 2nd of June, 1914.

The first of the two mortgage deeds was executed by Bhawani Prasad and others in favour of Hardeo Sahai, and the second by the same mortgagors in favour of Hukam Chand and Gauri Shankar. Under these two deeds the amounts due under two prior mortgage deeds, dated the 16th of June, 1894, and the 1st of March, 1897, were paid off and only a sum of Rs. 500 was paid in cash which was said to have been required for the purchase of corn for daily consumption and for the completion of the mortgage deeds in question.

In the one case the only contesting defendant was a subsequent transferee, Inayat Ilahi; and in the other Maharaj Singh, one of the members of the mortgagor's family, also contested the suit. The other defendants did not put in any appearance. On behalf of the contesting defendants the execution of the documents as well as the passing of consideration were denied. It was further pleaded that there had been no legal necessity for the transfers, and that the mortgage deeds were therefore not binding on the family.

The learned Subordinate Judge was of opinion [illegible] not open to Inayat Ilahi, he being a [illegible] such a plea, and he further held that the other [illegible] defendant, Maharaj Singh, not having been [illegible] when the two prior mortgage deeds were [illegible] competent to challenge the transactions. He [illegible] decreed both the suits in full. [illegible] defendants, other than Maharaj Singh, [illegible] appeals, and on their behalf [illegible] execution and the passing of [illegible] it has been strongly contended [illegible] necessity for these transfers.

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The first question which arises is as to whether it is open to the transferee Inayat Hari to raise the contention of want of legal necessity. This question would have thought, depended on the further question whether a transfer of joint property by a Hindu father without any legal necessity and not in lieu of any antecedent debt and without the consent, express or implied, of the other members of the family, was void or only voidable. If such a transfer were void, there can be no doubt whatsoever that any subsequent transferee who comes into possession of the property would be entitled to raise the point that the transaction was not binding on the property.

On the other hand, if the most such transaction were merely voidable at the option of the non-consenting members of the family, then it is difficult to see how a subsequent transferee of the property itself could be allowed to question it. A transaction which is voidable remains good so long as it is not challenged by the members who have the option to have it set aside. It is for them to exercise or not to exercise the option. If, without exercising that option and in fact admitting the validity of the mortgage, they transfer the property, the transferee cannot be allowed to say that he has rescinded that option by the transfer.

Undoubtedly it has been held in a number of cases that a transfer by a Hindu widow, who possesses the whole estate for the time being and who certainly has power to transfer the property for her life time, is only voidable at the option of the reversioners and not absolutely void. But as to a Hindu father, the whole estate does not vest exclusively in him but in the family of which he is the head. He may also, as the manager, be the agent of the family in relation to the outside world. The question whether a transfer by him without legal necessity is void or voidable is another matter. There are certainly observations in some old cases which go to show that such a transfer is not absolutely void but only voidable. In the case of *Hanuman Kamat* v. *Hanuman Mandur* (1), their Lordships of the Privy Council observed at page 126 that the sale by a Hindu father "was not necessarily void but only voidable if objection were taken to it by the other members of the joint family."

And the same view was expressed by a single Judge of this Court in the case of *Bishumbhar Dayal* v. *Parshadi Lal* (2). On the other hand, the learned advocate for the appellants

(1) (1891) I. L. R., 19 Cal., 123.
(2) (1912) 10 A. L. J., 112.

relies on the observations in the cases of *Balgobind Das* v. *Narain Lal* (1) and *Muhammad Muzamil-ullah Khan* v. *Mithu Lal* (2), where it was distinctly held that such a transfer without the consent of the other members of the family was "invalid."

Their Lordships in the leading case of *Sahu Ram Chandra* v. *Bhup Singh* (3) observed: "any deed of gift, sale or mortgage granted by one co-parcener *on his own account* of or over the joint family property is invalid; the estate is wholly unaffected by it and its entirety remains free of it." It may be that the word "invalid" is not necessarily the same thing as void. We do not, however, think it necessary to go any further into this question as we feel ourselves bound by the ruling of the Full Bench in *Muhammad Muzamil-ullah Khan* v. *Mithu Lal* (2), which laid down that it is open to a subsequent transferee to take the plea that the prior mortgage was without legal necessity.

The question still remains how far the present transferee Inayat Ilahi is bound by his undertaking to pay off the prior debts. In the sale-deed which was executed on the 6th of January, 1919, in his favour, it was admitted by the vendors in the clearest terms that the prior debts contracted by their ancestors were binding on them. They purported to transfer only the equity of redemption (*i.e.*, property subject to those mortgages) and actually left in deposit with the vendee the whole sum due in order that the same might be paid to the representatives of the prior mortgagees. Having undertaken to pay off these debts, the vendee now turns round and says that he is not bound to pay them, though his sale-deed contains a very clear admission on behalf of all the members of the family who were parties to it that the prior mortgage debts had been incurred for legal necessity and were binding on the family.

It is to be noted that 12 years have not yet expired since the execution of the sale-deed. The vendee's title as against the whole family, therefore, rests on this document alone, that is to say, he must admit that it is under this document that he has acquired the property from the whole family. This, in our opinion, means that the persons who executed the document in his favour were acting on behalf of the whole family. It follows, therefore, that the admission contained in this document must, so far as the vendee is concerned, be taken to be an

(1) (1883) I. L. R., 15 All., 339.
(2) (1911) I. L. R., 33 All., 783.
(3) (1917) I. L. R., 39 All., 437 (449).

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admission made on behalf of the whole family; and that admission is that the prior mortgage deeds were binding on the family.

And, therefore, even though it is true that such an admission cannot operate as an estoppel against the defendant inasmuch as there was no privity of contract between the mortgagees and him, and further because the plaintiff's position has in no way been changed, still there can be no doubt that this admission is a very strong piece of evidence in favour of the view that the transactions must have been for valid necessity, otherwise they would not have been accepted as such by all the members.

Coming to the facts, we find that the dealings really go back to a very early period. The earliest document that was executed was dated the 22nd of January, 1873, by Hardeo, the grandfather of the present mortgagor, in favour of one Ajit Singh, for a sum of Rs. 98, the whole of which had been paid in cash. It is true that this amount being secured on the family property cannot be treated as an antecedent debt in the strict sense of the term. But it having been borrowed as early as 1873 and evidence as to the actual necessity having disappeared, subsequent admission of its validity would be a very strong piece of evidence to be considered. This deed was followed by a mortgage deed of the 19th of May, 1873, by the same mortgagor, in favour of the same person, for a further sum of Rs. 200, the whole of which was either to be advanced to have been received beforehand or was paid in cash before the Sub Registrar. The third document was of the 26th of January, 1874, for a sum of Rs. 250, out of which Rs. 113-8-0 were given credit for on account of the amount due on the first mentioned document and Rs. 136-8-0 were received in cash. The fourth mortgage was for a sum of Rs. 400, under which Rs. 229 were paid off on account of the amount due under the deed of the 19th of May, 1873, and a sum of Rs. 171 was received in cash. There is a recital in this document that this sum of Rs. 171 was required for the purpose of paying zamindari or revenue for the June instalment and for meeting certain personal expenses.

The fifth document was dated the 5th of January, 1875, for a sum of Rs. 400, under which the earlier document of the 26th of January, 1874, was paid off and a further sum of Rs. 118 was advanced. Then we have the document of the 5th of August, 1875, under which the fourth and fifth mortgage deeds were

paid off and the balance was received in cash. All these transactions are transactions entered into by Hardeo, the grandfather of the mortgagors, as early as the seventies

On the 31st of January, 1887, a mortgage by conditional sale for a sum of Rs 3,100 was executed in favour of the same mortgagee, Ajit Singh, under which he was put in possession of the mortgaged properties, and the amount due on the earlier document of the 5th of August, 1875, was paid off. There is a further recital in this document that Rs. 505-7-3 were due on account of a Munsif's court decree and Rs. 64-8-9 were due on account of prior debts. Rupees 150 were paid in cash. There can be no doubt that this mortgage by conditional sale was fully acted upon and the mortgagee entered into possession soon after. He and his representative have been in possession of the property since then, which means that during the whole of a period of over thirty years the mortgagors' family has allowed this property to remain out of its possession.

On the 16th of June, 1891, another mortgage deed was executed by Durga Prasad, Munna Lal and Bhawani Prasad, the sons of Hardeo, in favour of one Musammat Lachmi Bai, for a sum of Rs. 6,400. Under this document Rs. 6,100 were left with the mortgagee to pay off the mortgage by conditional sale, the validity of which was of course accepted, and Rs 300 were acknowledged to have been received in cash. There can be no doubt that subsequently Musammat Lachmi Bai, the mortgagee, paid off the prior mortgage and entered into possession of the property in place of the previous mortgagee On the 1st of March, 1897, another mortgage deed by the same three persons was executed for a sum of Rs. 900 and the recital is to the effect that the money was required to pay off a decree for arrears of rent held by Chaudhri Sundar Singh and another and to meet certain personal expenses. The property hypothecated under this bond was the same as that covered by the mortgage by conditional sale

Up to the year 1914 no attempt was made by any member of the mortgagors' family to challenge any of these mortgage deeds or to recover the property from the possession of the mortgagees. The family seems to have acquiesced in these transfers A third party would, therefore, be quite justified in presuming that the debts must have been incurred for family necessity. On the 2nd of June, 1914, six members of the family, namely, (1) Bhawani Prasad, acting in his own right

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and as guardian of his sons Ram-i Dhar and Baldeo Singh, (2) Gaya Prasad, (3) Kalka Prasad for self and as guardian of his minor son Sarup Singh, (4) Machhlan, (5) Sheo Narain for self and as guardian of his minor sons Sughar Singh, Babu Ram and Chute Tha and (6) Sewak Singh in his own right and as guardian of M[illegible] Singh, executed the documents in suit under which the amounts due under the previous [illegible] deeds of 1894 and 1897 mentioned above were left with the mortgagees to be paid off and the balance of Rs. 500 was said to have been required for [illegible] for daily consumption and meeting the expenses of the execution and the registration of the deeds.

It was one year after these [illegible] deeds that Inayat Ullah obtained a sale-deed on the 6th of [illegible], 1919, in which there was a recital in favour of the vendee that the two mortgage-deeds [illegible] had been validly executed and were binding on the family.

It is true that in a case where a mortgagee wishes to enforce a charge against the family so as to fix the burden lies on him to satisfy the court that the [illegible] transaction had been entered into for family necessity or in lieu of antecedent debt or with the consent, express or implied, of all the members of the family. In the present case we are of opinion that this burden has been [illegible] In the first place, the transactions extend back to the year 1879 and for all this long period there never has been any protest made by any member of the family. Furthermore, there is nothing to show that in the years 1894 and 1897 there were any major members of the family alive who were not parties to the transaction and whose consent ought to have been obtained and was not obtained. In fact the ages of the various defendants as given in the plaint would rather go to show that all of them or at least most of them were not even born in those years. A long series of renewal of mortgage transactions extending, for over a period of a without any protest by any member of the family would show its acceptance, and raise a fair presumption that if there had not been a valid necessity for them, some objection would have been raised. The present mortgagees were not the court years in the years 1894 and 1897, and so it is not a matter within their special means of knowledge as to whether the amounts borrowed on those dates had been incurred for legal necessity. In view of the long continued acquiescence of all the members of the family, at any rate by all the adult members of the

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family, and the express admission contained in the sale-deed of the 6th of January, 1919, we are of opinion that it must be held that in this case the burden of proof of legal necessity has been completely discharged. It is not now possible, after the lapse of so many years, to produce evidence to show for what purpose the money was borrowed or how it was actually spent by the mortgagors. All that the mortgagees are required to show is that like ordinary men they were reasonably satisfied that legal necessity must have existed. In view of the conduct of all the members of the family in allowing the property to remain out of their possession for such a long time we think that this must be taken to have been so. Even though all these sums were borrowed on the security of the family property and although there is no direct evidence to show the actual necessity to meet which all the sums were borrowed, we are of opinion that the burden of proving the existence of legal necessity must be held to have been discharged. It was to pay off these debts, and in that way to recover the property from the mortgagees, that the mortgage deeds in suit were executed. The family cannot now be allowed to retain the benefit and repudiate the liability.

We think it right to note that in the court below, with the exception of the transferee, only one defendant Maharaj Singh contested one of the suits. All the other defendants did not put in any appearance nor filed any written statement. The question of want of legal necessity was a mixed question of law and fact and none of these defendants ever attempted to raise it. None of them went into the witness box to explain away their own admissions. The plaintiffs produced some oral evidence also, which, under the circumstances, we do not propose to discuss. After the decrees in the two suits were passed, Maharaj Singh, the only defendant who was a member of the family, submitted to the decrees and has not appealed. The persons who now appeal are the transferee Sheikh Inayat Ilahi and certain other defendants who did not put in an appearance in the court below and who did not raise the question at all. Their reluctance to submit themselves to cross-examination suggests to some extent that they did not feel confident that they would be able to explain their previous admissions. The evidence of Jhau Lal and Hardeo Sahai is to the effect that Rs. 500 were taken to meet private expenses and the expenses of registration. The recital in the deed is to the same effect. The defendants have given no oral evidence to rebut it. Their

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own evidence would at least have shown for what purpose Rs. 500 were required. Neither the transferee nor these other defendants, who never contested the claim, can, therefore, succeed. The result is that both these appeals fail and are hereby dismissed with costs.

Appeal dismissed.

MISCELLANEOUS CRIMINAL.

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June, 7.

Before Mr. Justice Kanhaiya Lal.

BANSI AND OTHERS v. LAKSHMI DAS.*

Criminal Procedure Code, sections 526, 561A; Act No. XIII of 1859 (Workman's Breach of Contract Act), section 2; Jurisdiction; Transfer.

Held that an inquiry under the provisions of Act No. XIII of 1859 is not one to which section 526 of the Code of Criminal Procedure applies, but may be transferred by the High Court to any other court subordinate to it of equal or superior jurisdiction to that in which it was instituted.

This was an application for the transfer of certain proceedings under section 2 of the Workman's Breach of Contract Act, 1859, which were pending before a Magistrate in the district of Moradabad, to the Allahabad district, and the question was raised whether section 526 of the Code of Criminal Procedure applied to such proceedings, and whether, therefore, the High Court had power to order their transfer.

The facts of the case sufficiently appear from the order of the Court.

Mr. *A. P. Dube*, for the applicants.

The Government Advocate (Babu *Lalit Mohan Banerji*), for the Crown.

KANHAIYA LAL, J.:—This is an application for the transfer of a proceeding pending against certain labourers under section 2 of the Workman's Breach of Contract Act (No. XIII of 1859) as amended by Act No. XII of 1920. The employer is a resident of Moradabad and carries on a stone ballast business in Shankargarh in the district of Allahabad. He advanced money to certain labourers and employed them for the purpose of working at Shankargarh. His complaint was that after working for a little while they disappeared. That complaint is being inquired into by one of the Magistrates at Moradabad. The labourers are residents of Shankargarh and desire that the complaint should be inquired into in the district of Allahabad where the alleged breach of contract is said to have taken place. It is admitted that the advances were made at Shankar-

* Criminal Miscellaneous No. 98 of 1923.

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garh and that if any breach of contract took place, it must have taken place at Shankargarh too. The witnesses are all said to belong to the same place. It is, therefore, conducive to the convenience of the parties if the case is inquired into at Allahabad. It is urged on behalf of the employer that the Workman's Breach of Contract Act intends that such inquiry should be made at the place where the master or employer resides and carries on business. The Act does not, however, lay down the procedure which is to regulate such an inquiry. It is an inquiry by a Magistrate or a Criminal Court within the meaning of section 6 of the Code of Criminal Procedure, and although the object of the inquiry is merely to issue coercive orders and, if necessary, to enforce the same by a sentence of imprisonment, there is nothing to show that such an inquiry is excluded from the operation of section 526 of the Criminal Procedure Code. The definition of "inquiry" given in section 4, clause (*k*), which includes every inquiry other than a trial conducted under the Code of Criminal Procedure by a Magistrate or a court, is not exhaustive so as to exclude an inquiry under the Workman's Breach of Contract Act of the nature above referred to. Any inquiry by a Magistrate or a Criminal Court subordinate to this Court can, therefore, be transferred under section 526, Criminal Procedure Code, to any Criminal Court of equal or superior jurisdiction subordinate to its authority, if the requisite grounds set forth in the section are established. The balance of convenience is undoubtedly in favour of the transfer of the criminal proceeding from Moradabad to Allahabad. The application is, therefore, allowed and the proceeding transferred to the court of the District Magistrate of Allahabad who can try the case himself or send it for trial to any Magistrate subordinate to him who may be competent to try the same.

Application allowed.

APPELLATE CIVIL.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Piggott.

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June, 7.

RUHUL AMIN (PLAINTIFF) v. SHANKAR LAL AND OTHERS (DEFENDANTS).*

Civil Procedure Code, section 99, order III, rules 1 and 2, order IV, rule 1

Plaint—Plaint presented by an alleged minor acting through a next friend, plaintiff being in fact of full age—Plaint invalid

Where a person who was in fact of full age presented to a court a plaint which purported to be a plaint in a suit by a minor and was received

* Appeal No. 3 of 1922, under section 10 of the Letters Patent

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to the court by a valid on the authority of [illegible] to be the next friend of the [illegible] was not merely a defective pleading, the defectiveness of which could be cured by amendment under the order of the court, but it was a totally invalid document which could give the court no jurisdiction to proceed with the suit. *Sheosahai* v. *Bhagat Singh* (1), *Ram Sarup* v. *John Smith* (2), distinguished.

THIS was an appeal under section 10 of the Letters Patent from the judgment of a single Judge of the Court. The facts of the case are stated in the judgment under appeal, which was as follows :—

"The [illegible] heard before me are the three appeals Nos. 320, 320 and 321 of 1920 in that the lower court [illegible] suit was instituted on behalf of Rupel Amin on the ground that the suit was instituted by him behalf by a third party, who alleged that Rupel Amin was then a minor and that he was acting as Rupel Amin's guardian ad litem, which, as a matter of fact, Rupel Amin was not proper in the view of the circumstances of the case. On the finding of fact, which [illegible] upheld on appeal, Rupel Amin was born about 1900. As a matter of law he appointed for him by the court, he attained majority on 1921. The suit was instituted on 1920, [illegible] 25. On the 12th of April, 1917, Rupel Amin came to the age of 21 and that he had attained majority since the institution of the suit. The case took an action upon that fact [illegible] The point appears to be [illegible] concluded, as far as I [illegible] by the decision in the case of *Sheosahai* v. *Bharat Singh* (1). The Court there [illegible] stated from the decision in the case of *Tajat Jan* v. [illegible] view taken in Calcutta has since been followed in Madras, but that Court has [illegible] as far as I know, dissented from the view taken in the case of *Sheosahai* v. *Bharat Singh* (1). The decision of a Bench is binding upon me. In that case, as in this, a person who really was a minor had been instituted a suit in a case in which it was alleged that she was a minor, [illegible] the plaintiff came forward during the course of the suit and [illegible] that she was a major. It was contended [illegible] that owing to error or fraud the application was [illegible] the certificate of [illegible] the matter, [illegible] to which I have referred, [illegible] have only to look at the actual [illegible] with the fact that her case was correctly stated in the certificate. I, therefore, dismiss these appeals with costs in Nos. 320 and 321."

Plaintiff appealed.

Maulvi *Iqbal Ahmad*, for the appellant submitted that the institution of the suit by the plaintiff as a minor, while in fact he was a major, was not fatal. The plaintiff had been misled by the age given by his mother in her application for her appointment as a guardian of the plaintiff, and under the certificate granted by the Judge the plaintiff was a minor at the date of the institution of the suit. The mistake under the circumstances was a *bona fide* mistake, and, in any event, an opportunity should have been given to the plaintiff to amend

(1) (1897) I. L. R., 20 All., 90.
(2) (1899) I. L. R., 22 All., 55.
(3) (1894) I. L. R., 21 Calc., 866

the plaint. The case of *Sheorania* v. *Bharat Singh* (1) relied upon by the lower courts had not been correctly decided. KNOX, J., who was one of the Judges who decided that case, was also a party to the later case of *Basdeo* v. *John Smith* (2) and the reasoning of the two decisions could not be reconciled. It was now well-established that the absence of or any defect in the signature or verification of the plaint would not lead to the dismissal of the suit. The plaintiff was entitled to an opportunity of curing these defects by amendment. The ruling in *Sheorania's* case had been dissented from in the other High Courts. He referred to *Taqui Jan* v. *Obaidulla* (3) and *Shanmuga Chetty* v. *Narayana Ayyer* (4). Moreover this point had not been pressed by the defendants in the trial court; they had not asked for any issue on the point nor had it been argued by them before the trial Judge. The lower appellate court should not have allowed this point to be raised before it for the first time, to the grave prejudice of the plaintiff. Had this point been raised before the trial Judge, the plaintiff would have asked for an opportunity of either amending the plaint or even filing a fresh suit properly constituted, within limitation. The dismissal of the suit on this ground by the lower appellate court would now prevent the institution of a fresh suit, as it would be beyond time. Having regard to the provisions of section 99 of the Code of Civil Procedure, the lower appellate court was not justified in reversing the decree of the trial court, as the defect in the suit was nothing more than a defect in the proceedings within the meaning of that section. He pointed out that section 578 of the Code of Civil Procedure of 1882 had been substantially modified in section 99 of the present Code, and referred to *Varajlal Bhashanker* v. *Ramdas Harikrishna* (5). Section 99 was of much wider scope and covered a defect in the presentation and filing of the plaint in a suit.

Again, on the 13th of November, 1917, the plaintiff had applied for permission to prosecute the suit as an adult in his own name. No proper orders had ever been passed on that application by the Subordinate Judge, and, in any case, the plaint should be deemed to have been validly presented and the suit properly commenced from that date. There was no

(1) (1897) I. L. R., 20 All., 90.
(2) (1899) I. L. R., 22 All., 55.
(3) (1894) I. L. R., 21 Calc., 866.
(4) (1916) I. L. R., 40 Mad., 743.
(5) (1901) I. L. R., 26 Bom., 259.

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ground for appeal was that the plaintiff had not authorized institution of this suit and it had not been commenced for his benefit.

Dr. *Kailas Nath Katju* (with him Munshi *Pamodar Das* and Pandit *Brij Mohan Lal Dave*), for the respondents, submitted that no amendment could cure the fatal defect in the institution of the suit. Under the Code the suit was instituted by proper presentation of a plaint. In this case the plaint was presented by a vakil who had been appointed by the next friend through whom the plaintiff had instituted this suit. Under order III, rules 1 and 2, a plaint must be presented either by the plaintiff himself or by his recognized agent or his properly appointed pleader. The pleader who presented the plaint had never been appointed either by the plaintiff or his recognized agent, and, therefore, there was no valid presentation of the plaint itself, and failing such a valid presentation, the court had no jurisdiction to entertain the plaint or to enter upon the trial of the case. A valid presentation was the essential pre-requisite of the commencement of the proceedings in a suit. Section 99 did not cover the case of a defective presentation of the plaint. Section 99 presupposed a validly presented plaint and an irregularity in the subsequent proceedings in a suit. He referred to the cases of *Sheoraina* v. *Bharat Singh* (1) and *Mohammad Ali Khan* v. *Sakin* (2), subsequently affirmed on Letters Patent appeal: See 11 A. L. J., 1015.

That case was on all fours with the present case. There a memorandum of appeal which had been presented by a pleader who had not been properly appointed was held to be invalid and the appeal was dismissed. The cases in which documents that had not been presented for registration by properly authorized persons were held to be bad bore close resemblance to the present case. The jurisdiction of the Sub-Registrar to register a document depended upon its presentation by a duly authorized person. Any defect in his subsequent procedure in relation thereto was cured by section 87 of the Registration Act.

In the very case—*Varajlal Bhaishanker* v. *Ramdat Harikrishna* (3)—relied upon by the appellant, it was observed that the jurisdiction of the courts did not commence till a suit had been instituted in the manner allowed by the law. Subsequent

(1) (1897) I. L. R., 20 All., 90.
(2) (1915) 11 A. L. J., 458.
(3) (1901) I. L. R., 26 Bom., 259.

mistakes and irregularities might be condoned under section 578, provided the suit had been instituted in such a way as to give the court authority to try it. (*Vide* p. 266). The case of *Sheorania* v. *Bharat Singh* (1) had, in substance, been rightly decided, though the observations therein regarding the necessity for the signature and verification of the plaint might have been too widely put. It had never been dissented from in this Court and should be followed. In the cases in Calcutta and Madras the learned Judges had overlooked the vital necessity of a valid presentation of the plaint in order to give jurisdiction to the court to entertain it. The defect in valid presentation could not be cured by amendment because there was nothing to amend. As the application made by the appellant on the 13th of November, 1917, had not been pressed, the order of the courts calling upon him to file the certificate of guardianship had not been obeyed, and in reality the application was not made with the object of curing any defect in the institution of the suit at all. The objection as to this defect had been taken in the written statement and the plaintiff had full notice of the defect in the suit, and it was too late now to ask the court to grant him an indulgence. The defendants were various transferees from the ostensible owners, and any indulgence now granted to the plaintiffs would gravely prejudice their rights.

Maulvi *Iqbal Ahmad* replied.

MEARS, C. J. and PIGGOTT, J.:—The three connected appeals before us arise out of one single suit. This was filed by Ruhul Amin, the appellant before us, as long ago as the 24th of March, 1916. The object was to set aside a transfer purporting to have been effected by a sale-deed of the 16th of November, 1906, executed by various persons, and, amongst others, by the mother of the plaintiff, who purported to act on behalf of the plaintiff, then a minor, as his natural guardian. There was a long array of defendants, including numerous subsequent transferees of the property concerned. In the written statements of at least two of these defendants the point was taken that the plaintiff had attained majority prior to the institution of the suit, and that the plaint purporting to be signed and verified on his behalf by a next friend, namely, the father's sister's son of the plaintiff, was not valid in law, and that there had been no valid presentation of the plaint. It is impossible for us to say why the trial court ignored these pleadings at the time of the settlement of the issues. Both

(1) (1897) I. L. R., 20 All., 90

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parties are to blame for not having insisted upon an issue being struck on a question of this nature, which went to the very root of the case. The plaintiff, in particular, finding it alleged against him that the suit was not even validly before the court, should have, in our opinion, taken prompt action. He could either have accepted the plea regarding his minority as true in fact and asked permission to present the plaint formally to the court himself after making the trifling amendment which would have been necessary, or if he desired to stand by the allegation of his minority, he should have asked for an issue on the point. In the result the trial court went into the merits of the case and decreed a part only, though a substantial part, of the plaintiff's claim.

There were three appeals filed, one by the plaintiff himself, and one each by two sets of defendants who were dissatisfied with the decision of the trial court. The defendants who appealed again made it a ground of objection in the lower appellate court that there had been no valid plaint presented to the trial court, and that the whole of the proceedings of that court were vitiated by this defect. The lower appellate court entertained this plea. It went into the facts of the case, and it found that the plaintiff had actually been born in the year 1890, so that he was over 20 years of age when the plaint was filed on his behalf by his father's sister's son. The learned Additional District Judge upon this state of facts held that there was an incurable defect in the whole of the proceedings in the trial court, that the decree of that court in favour of the plaintiff was a bad decree. He dismissed the plaintiff's appeal, allowed the appeals filed by the two sets of defendants and dismissed the suit.

It is unnecessary to inquire whether the lower appellate court could or could not have substituted for the decree of the trial court an order returning the plaint to the plaintiff, to be presented again after proper amendment. There is some authority for the adoption of this course in a decision of the Madras High Court, which has been laid before us; but there is no decision of this High Court lending support to such a view of the law. If there was never any valid plaint before the court, the proper order would seem to be one rejecting the petition tendered as a plaint and leaving it to the plaintiff to take such further action as he might think proper. In the present circumstances the question hardly arises, because by the

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time the learned Additional District Judge came to dispose of the appeals before him, the period of limitation, even reckoned from the date given in the plaint, had expired.

The suit having thus been dismissed, the plaintiff filed three appeals in this Court which were disposed of by a learned Judge of this Court in a single judgment. The learned Judge held that the question of law sought to be raised was concluded, so far as this Court is concerned, by the decision in the case of *Sheorania* v. *Bharat Singh* (1). He dismissed the appeals accordingly.

Various points have been raised in argument before us. The first was with reference to a later decision of this Court in the case of *Basdeo* v. *John Smith* (2). There are expressions in the judgment in that case which are inconsistent with some of the principles on which the decision in *Sheorania* v. *Bharat Singh* (1) appears to proceed. But the two cases are in their essence quite distinct. In *Basdeo's* case the learned Judges were at pains to point out that there was before the court a plaint which had been validly presented by an advocate of the court, in whose favour there existed a clear presumption that he had authority to present the plaint. This being so, the only question was whether an alleged defect in the matter of signature or verification was or was not curable under the provisions of section 578 of the then Code of Civil Procedure, corresponding with section 99 of the present Code. In the case before us the point taken against the plaintiff essentially was, and is, that his plaint had never been validly presented to the court. That it had not been so presented seems obvious upon reference made to the provisions of order IV, rule 1, and order III, rules 1 and 2, of the Code of Civil Procedure. A defect of this sort can scarcely be regarded as a defect or irregularity in any proceeding in a suit within the meaning of section 99 of the Code of Civil Procedure; and, in any case, it is a plea which affects the jurisdiction of the court. The trial court had no jurisdiction to entertain the suit at all, except upon a plaint properly presented: and it ought to have gone into the question of the presentation of the plaint and determined it before it proceeded to try the suit.

The next substantial point argued before us is with reference to a petition, presented on behalf of the plaintiff to the trial court, through counsel purporting to be duly authorized

(1) (1897) I. L. R., 20 All., 96.
(2) (1899) I. L. R., 22 All., 55.

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on his behalf. The date of the presentation of this petition appears to have been the 14th of November, 1917, though it is stated as the 13th of April, 1917, in the order under appeal. The petition was to the effect that the plaintiff, having now attained majority, desired to prosecute the suit in his own name, and asked the court to pass the formal orders necessary to enable him to do so. It was within the knowledge of the trial court that a certificate of guardianship had at one time been granted by the District Judge in favour of the plaintiff's mother in respect of the person and property of the plaintiff. One of the incidental difficulties in the case is that the plaintiff's age was grossly understated in the application on which this certificate of guardianship was ordered to issue. This, however, does not seem to have any essential bearing on the question of law before us. What we are now taking note of is the fact that the issue of this certificate of guardianship had been brought to the notice of the trial court. When, therefore, that court received the plaintiff's application to be permitted to proceed with the suit as a major, it passed an order that the plaintiff should produce for the inspection of the court the certificate of guardianship or a certified copy of the same. The plaintiff took no further action and never produced the paper called for by the court. The suit, therefore, went on to trial in the court of first instance in a wholly irregular manner, without this important application on the part of the plaintiff having been formally disposed of either one way or the other. We are far from satisfied with the procedure followed by the learned Subordinate Judge who tried this suit in the first instance. But we are nonetheless satisfied that a considerable degree of blame attaches to the plaintiff, or to his legal adviser in that court, for not prosecuting his own case with due diligence and not obtaining proper orders from the trial court upon essential points. Under the circumstances we do not think it possible to give the plaintiff any relief at this stage.

It has been suggested to us that the plaintiff's petition of the 13th of November, 1917, might be treated as a presentation of the plaint on his behalf by counsel properly authorized by him. But we are of opinion that, under the circumstances, it would be stretching the law too far in the plaintiff's favour to take such a view of that proceeding. The presentation of that petition might have had an effect equivalent to a fresh presentation of the plaint, or might have led to some further proceeding or order on the part of the trial court which would

have had that effect, if it had been properly followed up by the plaintiff. But as the case stands we are unable to take this view.

The result is that this and the connected appeals fail and we dismiss this appeal with costs.

Appeal dismissed

Before Mr. Justice Lindsay and Mr. Justice Sulaiman.

BALDEO MISIR (DEFENDANT) v. RAM LAGAN SHUKUL (PLAINTIFF).*

Pre-emption—Duty of plaintiff pre-emptor to establish his right at three crucial dates—Pre-emptive right not affected by anything happening subsequent to the judgment of the trial court.

It is incumbent upon the plaintiff in a suit for pre-emption to satisfy the court that his right to pre-empt was subsisting at three crucial points—at the date of the sale upon which the suit is based; at the date of the filing of the suit, and at the date of the judgment of the court of first instance. But an appellate court cannot take into account anything which may have happened subsequent to the date of the judgment of the trial court, which, had it happened earlier, might have deprived the plaintiff of the right to pre-empt *Ram Gopal* v. *Piari Lal* (1), *Bhagwan Das* v. *Mohan Lal* (2) and *Rohan Singh* v. *Bhan Lal* (3), referred to

THE facts of this case sufficiently appear from the judgment of the Court

Dr. *M. L. Agarwala* and Pandit *Lakshmi Narain Tiwari*, for the appellant.

Munshi *Haribans Sahai*, for the respondent.

LINDSAY and SULAIMAN, JJ.:—This is a defendant's appeal arising out of a suit for pre-emption. The main plea taken on behalf of the defendant was that the plaintiff had no preference over him. The court of first instance dismissed the suit on the 24th of July, 1920. On appeal the lower appellate court was of opinion that under the custom recorded in the *wajib-ul-arz* the plaintiff had a right of preference as against the defendant vendee though the latter was a co-sharer in the same *thok*. The decree of the first court was accordingly set aside and the suit decreed. A second appeal was preferred to this Court on the 28th of July, 1921, and one of the grounds raised in the memorandum of appeal was that inasmuch as the plaintiff respondent had ceased to be a co-sharer at the time of the lower appellate court's decree, his suit should have been dismissed.

* Second Appeal No. 1167 of 1921, from a decree of Lala Gopal Mukerji, Second Additional Judge of Gorakhpur, dated the 6th of May, 1921, reversing a decree of Girish Prasad, Additional Munsif of Deoria, dated the 24th of July, 1920.

(1) (1889) I. L. R., 21 All., 441.
(2) (1903) I. L. R., 25 All., 521.
(3) (1909) I. L. R., 31 All., 230.

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An affidavit was filed in support of the allegation implied in that ground and time was given to the opposite party to file a counter affidavit if necessary. No such affidavit was filed.

We may, therefore, take it that it is the appellant's case that on the 20th of April, 1921, the share of the plaintiff pre-emptor, on the strength of which he had instituted the suit, was sold at auction and purchased by a third party. This sale was subsequently confirmed and a sale certificate of a later date was issued, a certified copy of which is also filed along with the affidavit. We may, therefore, take it that the plaintiff respondent ceased to be a co-sharer on the 20th of April, 1921. This, however, was a date subsequent to the date of the first court's decree. But we would like to note that although the auction-purchase had taken place before the passing of the decree of the lower appellate court, the fact was never brought to the notice of that court.

It is well settled law that a plaintiff pre-emptor in order to be able to maintain a suit for pre-emption must establish his right to pre-empt on three material dates. He must have a right of pre-emption at the time when the sale took place; otherwise he would have no cause of action at all. He must also have the same right at the time when the suit is brought or else he would have no *locus standi* to sue. A possible view to take might have been that nothing which happens after the institution of a suit can alter the position of the parties. But it has been held in a number of cases by this Court that it is incumbent on the plaintiff to prove that his right to pre-empt continues up to the date when the decree ought to have been passed in his favour, namely, the date on which the case was disposed of by the first court. It matters little whether the court of first instance did actually dismiss or decree his suit. The date of that court's decree is the date on which, if the plaintiff's contention is correct, the decree ought to have been passed in his favour. This principle was the basis of the decision in the following cases:—*Ram Gopal* v. *Piari Lal* (1), *Bhagwan Das* v. *Mohan Lal* (2), *Rohan Singh* v. *Bhan Lal* (3) and of *Shankar Lal* v. *Karori Mal* (4), recently decided by this Bench. The last crucial date in such cases must, therefore, be taken to be the date of the first court's decree. If subsequent events were allowed to alter the form of the decree,

(1) (1893) I. L. R., 21 All., 111.
(2) (1903) I. L. R., 25 All., 421.
(3) (1908) I. L. R., 31 All., 536.
(4) S. A. No. 518 of 1922, decided on 1st of June, 1923.

it would lead to much confusion. It is impossible to hold that having regard to the position of the parties as it stood on the date of the first court's decree, any other decree could have been passed on that date. Furthermore, an appellate court cannot take into account these subsequent events without admitting fresh evidence in appeal, which may not always be permissible.

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We are, therefore, of opinion that the subsequent loss of the share by the plaintiff can in no way affect the right he possessed at the time when the decree in his favour ought to have been passed by the first court.

The other grounds taken in the memorandum of appeal have not been seriously pressed. The result, therefore, is that the appeal fails and is hereby dismissed with costs.

Appeal dismissed

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Piggott

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June, 8.

HAWAI RAI AND OTHERS (PLAINTIFFS) v. HAR PRASAD AND OTHERS (DEFENDANTS).[1]

Occupancy holding—Voluntary mortgage—Ejectment of possession by mortgagee—Suit for ejectment—Private partition—Jurisdiction—Civil and Revenue Courts.

The usufructuary mortgagee of an occupancy holding continued in possession of the holding after the death, without heirs, of the occupancy tenant, and subsequently let into possession certain co-sharers in the village, apparently in return for a money payment made in recognition of his rights as mortgagee. Certain other co-sharers, to whom the land of the occupancy holding had been allotted on a private partition amongst all the co-sharers, sued in a court of revenue to eject both the mortgagee and his assignees.

Held that the suit was properly brought in a court of revenue and that the plaintiffs were entitled to a decree against the defendants in possession as being either tenants-at-will or sub-tenants of the plaintiffs.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. *M. L. Agarwala*, for the appellants.

Mr. *J. M. Banerji* and Munshi *Haribans Sahai*, for the respondents.

MEARS, C. J. and PIGGOTT, J. :—One Ram Naresh was the occupancy tenant of a certain holding. He mortgaged the same with possession to one Dukhit Misir, at a time when such mortgages were not forbidden by law. Dukhit accordingly entered into possession of the holding lawfully with the status of a mortgagee. Ram Naresh died in the year 1913. Dukhit remained for a time in possession as a tenant-at-will. His rights as mortgagee had been determined because Ram Naresh had left no heir entitled to succeed to the tenancy. Dukhit has

[1] Appeal No. 11 of 1922, under section 10 of the Letters Patent

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let into possession Har Prasad Rai and others, who are co-sharers in the village, and we may take it as found that he has let them into possession in return for a money payment made in lieu of his rights as a co-sharer. The plaintiffs came into court alleging that they were the sole proprietors of the land which formed the occupancy holding of Ram Naresh. They claimed that Dukhit was their tenant-at-will, and that they were entitled to eject him under the ordinary procedure prescribed by the Oudh Tenancy Act, No. II of 1901. Along with Dukhit they claimed to eject Har Prasad Rai and others, who have been described as persons let into possession by Dukhit. In reply to the claim Dukhit said that he was no longer in possession, and had no longer any concern with the land, that he had been paid off by Har Prasad Rai and others, and that the plaintiffs might settle accounts with them. Har Prasad and others pleaded that they were not merely co-sharers in the village, but co-sharers along with the plaintiffs in the proprietary right over the particular land in suit. They claimed, therefore, that having induced Dukhit, no matter by what means, to surrender the land into their possession and occupation, they became entitled to hold the same as their *khudkasht*. In any event they contended that the plaintiffs had no right to sue them for an ejectment in a rent court. The Assistant Collector who tried the case seems to have gone very carefully into the evidence and to have framed proper issues. There has been some controversy before us whether, on the pleadings of the two parties, section 199 of the Tenancy Act did or did not apply; if it did apply, then the question of proprietary title was tried by the Assistant Collector, and there has been no contravention of the provisions of that section. The conclusion arrived at by the Assistant Collector was that, although according to the village records both the plaintiffs and the contesting defendants, Har Prasad Rai and others, held proprietary rights in respect of the land in suit, nevertheless there had been a private partition amongst the co-sharers, not carried out through the agency of a Revenue Court, and not recognized in the revenue papers, according to which private partition the plots of land in suit constituting the occupancy holding of Ram Naresh had been assigned wholly to the plaintiffs. On this finding, principally, the Assistant Collector decreed the suit for ejectment. There was an appeal by Har Prasad Rai and his co-defendants to the court of the District Judge. The District Judge, affirming the findings of the

Assistant Collector, dismissed the appeal. On a second appeal being brought to this Court, a learned Judge of this Court has reversed the findings of both the courts below, and has dismissed the suit. We are not quite clear as to the attitude of the learned Judge of this Court with regard to the finding of the lower appellate court on the question of the separate title of the plaintiffs. He treats that finding as amounting to no more than this, that there had been an arrangement for convenience of collection amongst the various co-sharers of the *mahal*, by which the right to collect rent from Ram Naresh had been assigned to the plaintiffs alone. He clearly intends to hold that such an arrangement would not amount to a partition of the land amongst the various co-sharers, or to a surrender on the part of Har Prasad and others of their interests in the proprietary rights over the land in suit, in return for a similar surrender on the part of the plaintiffs of their interests in the proprietary rights over other lands forming part of the same *mahal*.

We do not think, however, that the finding of the learned District Judge can be interpreted in the way in which it has been in this Court. The finding itself is embodied in the words:—"I hold that under a private partition the plaintiffs respondents are the proprietors in exclusive possession of plot No. 879 and that they are entitled to eject the defendants appellants." Moreover, this finding is to be read in connection with the judgment as a whole, and also with the judgment of the Assistant Collector which was then under appeal. We think that both the trial court and the lower appellate court intended to find, and did find, that there had been a private partition of the *mahal* by virtue of which the land in suit had been assigned exclusively to the plaintiffs.

It will hardly be contested that the co-sharers in a *mahal* have a right to effect a partition by private arrangement amongst themselves, and that it may be the most convenient method of effecting such a partition to assign the entire holding of a particular tenant to a particular group of co-sharers. The only difference between a partition effected by private arrangement and one properly carried out under the orders of the court is that the incidents of the private partition are difficult to prove, and that confusion and litigation may arise afterwards owing to the preparation of village records which are at variance with the actual facts. We [illegible] however, in this case

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allow the appeal and to decree the plaintiff's suit in favour of the plaintiff on the appellant's petition of claim, only.

The other point taken by the learned Judge of this Court is that in any event the defendants Har Prasad Rai and others are not tenants of the plaintiff, and he seems to think that there was some distinction in the procedure to be followed by the plaintiff in bringing a suit against a person for ejectment of tenants, in the rent court, and of persons, against Har Prasad Rai and others, on usual elements of the proprietary rights, by a mere person, not instituted in a court of civil jurisdiction.

It seems to us a little doubtful whether, in the event of the plaintiff having selected the course adopted by the learned Judge of this Court, Har Prasad Rai and his co-defendants would not at once have been declared Dukhit and set up the plea that until their Dukhiti tenancy was extinguished, no suit for ejectment would lie in a civil court in the rent court. At any rate, the position of the plaintiff is, in our opinion, clear and is unassailable on the facts alleged by them and found in their favour. Apart from the provisions of section 34 of the Tenancy Act, when once the court has found in favour of the exclusively proprietary title of the plaintiff, there remains the fact, admitted in the pleadings and not seriously controverted, that Har Prasad Rai and his co-defendants were let into possession by Dukhit. Either they are trespassers of whatever sort Dukhit possessed under his mortgage, in which case they are put in much the tenant at-will of the plaintiff as Dukhit himself was, or they are in the position of sub-tenants who have paid Dukhit a premium instead of an annual rent. This has been made still clearer by pleadings entered by Har Prasad Rai and his co-defendants in the 3rd paragraph of their written statement. We think the learned Judge of this Court was wrong and that he should not have interfered with the decision of the lower appellate court. We set aside the decree of this Court and restore that of the lower appellate court, allowing the plaintiff's their costs of both hearings in this Court.

Appeal decreed.

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June, 12

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr Justice Piggott

SHAM BIHARI LAL AND OTHERS (PLAINTIFFS) v. RAM KALI (DEFENDANT) *

Hindu Law—Stridhan—*Succession*—*Daughter's daughter or son's son*—*Nature of* stridhan *property in the hands of heir.*

Held that a daughter taking as heir to her mother property which was *stridhan* in the hands of the mother, does not take it as her own *stridhan*, but takes it with a limited estate, with reverter after her death to the heirs of her predecessor *Subramanian Chetti* v *Arunachalam Chetti* (1) and *Hari Doyal Singh Sarmane* v *Grish Chunder Mukerjee* (2), referred to

Held also, that a daughter's daughter is a nearer heir than a son's son to the *stridhan* of a Hindu female *Sheo Partab Bahadur Singh* v *The Allahabad Bank* (3), referred to *Sheo Shankar Lal* v *Debi Sahai* (4), explained and distinguished

THE facts of this case are fully set forth in the judgment of the Court.

Munshi *Gulzari Lal*, Munshi *Janq Bahadur Lal* and Munshi *Shiva Prasad Sinha*, for the appellants.

Pandit *Baldeo Ram Dave* and Pandit *Uma Shankar Bajpai*, for the respondent.

MEARS, C. J., and PIGGOTT, J. :—This was a claim to certain property by inheritance. It was at one time the *stridhan* property of Musammat Sahodra, and descended after Sahodra's death to Musammat Ram Piari, her daughter. Ram Piari is now dead and the defendant in possession is Ram Kali, daughter of Ram Piari. The plaintiffs are the sons of one Ganga Din, who was a son of Musammat Sahodra. As the trial court has rightly remarked, it is now quite settled law that Musammat Ram Piari, taking this property by inheritance from her mother, did not take it as her own *stridhan*, that she took it with a limited estate, with the reverter after her death to the heirs of her predecessor.

The question for determination then is whether the defendant Musammat Ram Kali, as the daughter's daughter of Musammat Sahodra, is a nearer heir to Musammat Sahodra than the two plaintiffs who are the son's sons of that lady.

On behalf of the respondent it is contended that, under the Mitakshara school of law, there can be but one answer to this question, and that the daughter's daughter has the preference. In principle two other High Courts have undoubtedly affirmed the view that, in such a case as the present, we have to look to

* First Appeal No. 351 of 1920, from a decree of Harihar Lal Bhargava, Subordinate Judge of Shahjahanpur, dated the 17th of June, 1920.

(1) (1900) I. L. R., 28 Mad., 1.
(2) (1889) I. L. R., 17 Calc., 911.
(3) (1903) I. L. R., 25 All., 476.
(4) (1903) I. L. R., 25 All., 468.

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the *stridhan* heirs of the female in whose hands the property was held as *stridhan*; vide *Subramanian Chetti* v. *Arunachalam Chetti* (1), and *Hari Dogal Singh Sarmana* v. *Grish Chunder Mukerjee* (2). Moreover, in the case of *Sheo Partab Bahadur Singh* v. *The Allahabad Bank* (3), there is a very significant remark by their Lordships of the Privy Council inserted as a comment upon a dictum of the learned Judges of this Court who dealt with the same litigation at an earlier stage. Their Lordships had to deal with property which had been the *stridhan* of a lady named Kailash Kunwar and had passed from that lady to her daughter, Janki Kunwar. The main question which they had to determine was whether Janki Kunwar took that property from her mother with a limited estate, or whether the property itself remained *stridhan* in the hands of Janki Kunwar. Incidentally, however, their Lordships discussed the question of the devolution of the property after Janki Kunwar's death, and they quote a dictum of the learned Judges of this Court to the effect that when Janki Kunwar died childless the succession necessarily went "to the heirs of her father." After quoting this remark their Lordships add, "the proper heirs are the *stridhan* heirs of her mother in the absence of lineal heirs of the latter." It seems to us quite clear from this passage that if their Lordships had had to determine the devolution of the property then in suit upon the death of Janki Kunwar, they would have looked for the *stridhan* heir of her mother Kailash Kunwar, and inquired who those heirs would be according to the school of law to which the parties in that litigation were subject. If these were the only authorities before us, the point would seem almost too clear for argument. A certain difficulty has been created by an argument formerly pressed upon us by the learned counsel for the respondent, based upon the decision of their Lordships of the Privy Council in *Sheo Shankar Lal* v. *Debi Sahai* (4). The main question which their Lordships then had to decide was whether property inherited by a female from her mother was or was not *stridhan* in the hands of the female who so inherited it. That question, as we have already noticed, they answered in the negative. At page 471 of the report their Lordships say: "The precise question, therefore, arising for decision is whether under the

(1) (1904) I. L. R., 28 Mad., 1.
(2) (1880) I. L. R., 17 Calc., 911.
(3) (1903) I. L. R., 25 All., 476 (489).
(4) (1903) I. L. R., 25 All., 468.

Hindu Law of the Benares school, property which a woman has taken by inheritance from a female is her *stridhan* in such a sense that on her death it passes to her *stridhan* heirs in the female line to the exclusion of males." That was the only question really determined in the judgment. It must, however, be admitted that the defendants in that litigation were setting up, by way of *jus tertii*, the rights of a daughter of the female who had received the property in suit by inheritance, and, therefore, a daughter's daughter of the female who last held that property as *stridhan* with full rights of ownership over the same Their Lordships decided the case against the alleged *jus tertii* of this daughter's daughter. The learned Judges of the Madras High Court, in the case which we have already referred to, *Subramanian Chetti* v. *Arunachalam Chetti* (1), discussing this point, assumed that the decision in *Sheo Shankar Lal* v. *Debi Sahai* (2) proceeded upon a very limited pleading. They assumed that the right set up by way of a *jus tertii* was the right of the daughter as such and that nothing was ever pleaded, and nothing was ever decided, about the rights of that same female as a daughter's daughter. Mr. Mayne, on the other hand, in his Commentary on the Hindu law states, with full knowledge of the facts, for he had himself argued the case before their Lordships of the Privy Council, that as a matter of fact the difficulty suggested above was brought to the notice of their Lordships, but was met by himself in argument by a plea based upon a suggested differentiation in the line of descent between different kinds of *stridhan* property. It seems sufficient for us to say that the judgment of their Lordships of the Privy Council in *Sheo Shankar Lal* v *Debi Sahai* (2) is really silent on the particular issue which we have now to determine. The question which their Lordships set out to decide we have already quoted from the judgment itself and the decision of that question does not determine the appeal before the Court The further question raised regarding the result of the appeal in the case of *Sheo Shankar Lal* v. *Debi Sahai* (2) may be explicable either on the lines suggested by the learned Judges of the Madras High Court, or on the basis of the statement made by Mr. J. D. Mayne in his Commentary. We do not think that the argument based upon the decision in this case can be allowed to outweigh the considered opinion expressed upon the same point

(1) (1904) I. L. R., 28 Mad., 1
(2) (1903) I. L. R., 25 All., 468.

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in the case immediately following, that of *Sheo Partab Bahadur Singh* v. *The Allahabad Bank* (1), or that we ought, on the grounds taken by the learned counsel in support of the appeal, to dissent from the opinions of the learned Judges of the Madras and of the Calcutta High Courts in the cases we have already quoted. In our opinion, therefore, the decision of the trial court was right; and we dismiss this appeal with costs.

Appeal dismissed.

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June, 11

Before Mr. Justice Lindsay and Mr. Justice Sulaiman.

RADHAPATH RAI AND OTHERS (PLAINTIFFS) v. GOKUL RAI AND OTHERS (DEFENDANTS).*

Hindu law—Joint Hindu family—Suit by sons to recover joint ancestral property in the hands of a son and other members of the family.

Where a Hindu son in suing to recover possession of joint family property alleges by reference, and it is so admitted or proved that the plaintiff is a member of a joint Hindu family, that the property transferred was ancestral property, and that it was transferred without any legal necessity and not even mainly in order to pay off antecedent debts or for any purpose binding on the family, the burden lies on the defendant to justify the alienation.

THE facts of this case sufficiently appear from the judgment of the Court.

Dr. *Surendra Nath Sen* and Pandit *Uma Shankar Bajpai* for the appellants.

Dr. *M. L. Agarwala*, for the respondents.

LINDSAY and SULAIMAN, JJ.: This is a plaintiffs' appeal arising out of a suit for setting aside three sale deeds, two of which were executed on the 4th of December, 1901, and the third on the 20th of July, 1913, by the fathers and grandfathers of the present plaintiffs, on the ground that these alienations of ancestral property were without any legal necessity. There was no suggestion in the plaint that the debts had been contracted for any illegal or immoral purposes.

The defendants transferees contested the claim mainly on the ground that the debts had been incurred for family necessities and were binding on the plaintiffs. It was also pleaded that the claim was barred by time inasmuch as the plaintiffs were not born at the time of the first transfers.

The court below found that the plaintiff No. 1 was alive at the time when the transfers of 1901 took place and that the two remaining plaintiffs were born before the execution of the third sale-deed. It accordingly held that the plaintiffs were

* First Appeal No. 236 of 1921, from a decree of Ramji Das, Subordinate Judge of Ghazipur, dated the 31st of March, 1921.

(1) (1903) I. L. R., 25 All., 476.

entitled to maintain the suit. It, however, dismissed the suit on the ground that the burden lay on the plaintiffs to prove that the transactions were without any legal necessity and inasmuch as the plaintiffs had failed to discharge that burden, the claim stood dismissed. It relied mainly on two authorities, namely, *Gobaidhan* v. *Abdul Ghafur* (1) and *Sukhdeo Jha* v. *Jhapat Kamat* (2).

The plaintiffs have come up in appeal to this Court, and, on their behalf, it is strongly contended that the burden of proof was wrongly laid on them.

Both the cases referred to by the learned Subordinate Judge were cases in which the mortgagees were suing to enforce their mortgage and were, therefore, not parallel cases. In the first of these two cases all that SIR JOHN EDGE, C. J., remarked was that where a son comes into court to ask relief against a sale effected by his father *for an antecedent* debt, it would be for the son to make out a case for the relief asked.

In the Patna case, however, at page 948, there is an observation by SULTAN AHMAD, J., to the effect that courts have always drawn a distinction between a case where the property has passed out of the hands of the family by mortgage, sale or other alienation by the father, and the son sues for the recovery of the same, and the case where the mortgagee seeks to enforce the mortgage executed by the father against the sons who are in possession of the property. In the former case the son must show the grounds on which he seeks to set aside alienation by the father. In the latter, it is the mortgagee who has to show how he claims for the repayment of the debt of the father.

If the learned Judge intended to lay down a general proposition of law that in every case where a Hindu son brings a suit to recover possession of properties from transferees, the burden lies on him to prove that the transfer was without any legal necessity, then we would be inclined not to agree with that view. Of course, in every case the burden *primâ facie* lies on the plaintiff to establish his case; but where it is either admitted or proved that the plaintiff was a member of a joint Hindu family, that the property transferred was an ancestral property, that it had been transferred without the plaintiff's consent and not apparently in lieu of any antecedent debt or at

(1) Weekly Notes, 1887, p. 106.
(2) (1920) 54 Indian Cases, 946.

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an auction-sale, the burden would be on the defendant transferee to justify the alienation.

It is, however, not necessary for us to remand the case, for both the parties produced all the evidence which they intended to produce, and no evidence has been shut out. We, therefore, propose to consider the case on its merits, and, in the circumstances, we are of opinion that the evidence which the defendants have been able to produce is quite sufficient; we, therefore, hold that the defendants have discharged the burden of proving that these were good transfers. The result is that the decree of the lower court must be upheld. The appeal is dismissed with costs.

Appeal dismissed.

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Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Piggott.

MUHAMMAD TALEH AND ANOTHER (PETITIONERS) *v.* MUHAMMAD ABDUL BAQI KHAN AND OTHERS (OPPOSITE PARTIES).*

Act (Local) No. II of 1916 (United Provinces Municipalities Act), section 16(1)(c)—"Place of profit"—Holder of a contract with Municipal Board—Eligibility for election as a member of the Board.

A person who holds a contract for the supply of [illegible] and chandoor to a Municipal Board cannot be said to hold a "place of profit in the gift or disposal of the Municipal Board" within the meaning of section 16(1)(c) of the United Provinces Municipalities Act, 1916. Such a person, therefore, is not disqualified from being elected to and acting as a member of the Board to which he holds the contract.

THIS was a reference made by the Commissioner of the Allahabad division in the matter of a petition objecting to the election of a member of the Allahabad Municipal Board. The facts out of which the reference arose are fully set forth in the order of the Court.

Dr. *Kailas Nath Katju*, for the petitioners.

Dr. *Surendra Nath Sen*, Munshi *Harnandan Prasad* and Munshi *Sarkar Bahadur Johari*, for the opposite parties.

MEARS, C. J. and PIGGOTT, J.: At the municipal election held in March last in Allahabad one Khan Bahadur Muhammad Abdul Baqi Khan was a candidate, and was subsequently declared to have been duly elected. For some years he, with other members of his family, had held a contract for the supply of kerosine oil in bulk to the Municipal Board. He was a member of the Board, whose term of office came recently to an end, and he had some three years ago disclosed the

* Civil Miscellaneous No. 319 of 1923.

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existence of that contract to the Commissioner and had been duly given permission to hold the same. He sat as a duly elected member throughout the period of the last Municipal Board. When he deemed himself to have been duly elected this year, he again sought and obtained the permission of the Commissioner to carry out the contract notwithstanding his membership of the Board. A petition to unseat him is now in course of hearing by the Commissioner; and, amongst other grounds, it is alleged that he was disqualified from becoming a candidate for election, and that his election is consequently of no effect, because he was at the time a person who under section 16(3) (*c*) held a "place of profit in the gift or disposal of the Municipal Board."

The Commissioner has referred this point to us for our determination. The argument put forward by the petitioners is that the words "place of profit" were deliberately chosen as a compendious, all-embracing phrase to cover every recognized ground of disqualification such as are to be found in the Indian Acts in *pari materiâ*. In support of that argument Dr. *Katju* has referred us to the Bombay Municipal Act (Act No. III of 1901) where, amongst other provisions, disabilities attach to "a municipal officer or servant, a licensed surveyor, or plumber, or one who has directly or indirectly by himself or through his partner any share or interest in any contract or employment with or under, or by, or on behalf of the Municipality." Section 39 of the Calcutta Municipal Act has exactly similar disqualifying provisions. The Madras Municipal Act also affirms the inability of a person seeking election who has interest in any contract made with or work done for the corporation.

Therefore, had this question, which we are called upon to decide, arisen in any election to which the Bombay, Calcutta or Madras Acts applied, the position would be clear. The respondent would by the very words of either of these Acts have been disqualified for election. Here, however, we have to consider the words of the local Municipal Act, which are said to include the case of a man having a contract or interest in a contract with the Board. The question which we have to decide is whether it would be a fair construction of section 16 (3) (*c*) to say that on a reasonable rendering of the words "place of profit in the gift or disposal of the Municipal Board" they cover an ordinary commercial contract. The words "place of profit" have a definite historical association and also

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coupled with the word "office" are familiar to all students of constitutional history. The Act of Settlement, 12 and 13 William III, Chapter II, section 3, provides that upon the Accession of the House of Hanover, no person holding any office or place of profit under the king should be capable of serving as a member of the House of Commons. The phrase recurs in the Act of Settlement of 6th Anne and 6th Anne, Chapter XLI.

The object of these Acts was to ensure that the members of the House of Commons should be, as far as possible, free from any personal influence, or undue any likelihood of the exercise of authority by the monarch and should be free to give effect to their political opinions and should not be merely puppets. The offices or places of profit to which these enactments apply vary from posts which were merely sinecures in the Royal Household to positions of real, arduous duties as great officers of State. An examination of them fails to disclose that they were in any way connected with commercial contracts into which, after all, a King as well as a commoner has to enter for the supply of commodities.

As far as we are aware there is only one case in which the term "office or place of profit" has been the subject of a judicial decision. In *Astbury* v. *New Tivoli Ltd.* (1), the plaintiff sought an injunction to restrain the defendant company and the other Directors from preventing him from acting as a Director of the company. The defendant alleged that the plaintiff had ceased to be a Director because he had accepted from the company the position of a covering deed relating to debentures on terms of payment by the company to him for his services. They insisted that these circumstances caused his Directorship to be determined inasmuch as one of the articles of association provided that the office of a Director should be vacated if he held "any other office or place of profit under the company." MR. JUSTICE NORTH decided that the position of trustee for the debenture holders was "a place of profit," the object of the articles of association being to prevent the Directors from doing anything by which a Director continued to be a Director and yet accepted or held an additional office or place of profit under the company.

It will, therefore, be seen that the meanings which have been attached to the words "office or place of profit," do not lend any assistance to the petitioners, and they are thrown back

(1) (1899) 1 Ch., 151.

upon their original general statement that the draughtsman meant by that phrase to include, and the Local Government by its acceptance meant to enact, that it should cover the special disabilities specifically set out in the Bombay, Calcutta and Madras Acts. We are unable to accept that argument. We find it, for instance, difficult to give any meaning to the words in section 40, "continued to hold . . . any interest in a contract," or those in section 82, "continues to have . . . ." unless the Act contemplated the possibility of a candidate for election having in fact at the time an interest in a contract and being given by section 40 an opportunity of obtaining permission from the Commissioner on his election to carry out the contract notwithstanding his election. A contractor who receives remuneration for the supply of articles cannot, in accordance with the ordinary meaning of the word "place," be said to hold a place of profit. In Murray's Dictionary "place" is defined in this connection as "office, employment, situation." We are of opinion that the proper meaning which should be ascribed to the words "place of profit" in section 16 (3) (*c*) is one which denotes position and employment in the sense of having a title attached to such employment and a definite standing, and partaking of the nature and character of that of master and servant. That is, a position in relation to the Board in which the Board can require a person to obey its command and do certain work or render personal services in return for remuneration. Instances of this kind readily occur to one, *e.g.*, a consulting engineer who for a retaining fee holds himself at readiness to give expert opinions and furnish reports; a whole or part time medical officer with defined duties towards the Municipal Board; and each and every Municipal servant of any grade. This rule is necessary because members of a Board should not be in the false position of being masters and servants at one and the same time. We appreciate that the position of a contractor sitting on a Board may be a delicate one, and may give rise at times to difficult and embarrassing situations, but the question which we are called on to decide is whether on a fair construction of the words "place of profit" a contractor could be included. We think not, and though it may have been the intention of the local legislature to follow along the lines of the disqualifications which had found favour in the enactments of Bombay, Calcutta and Madras, the result, according to our view, is that they have failed to do so. That being so, we are of opinion that the holding of the [illegible]

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contract by Khan Bahadur Muhammad Abdul Baqi Khan did not prevent him standing as a candidate and does not invalidate his election; and this is the answer we return to the Commissioner.

REVISIONAL CIVIL.

Before Mr. Justice Daniels.

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MITHU LAL AND ANOTHER, PLAINTIFFS v. SUKHAL, DEFENDANT.*

Act No. V of 1908, Indian Civil Act, section 115—Agreement to decide by oath of opposite party—Court not competent to disregard agreement and enter into evidence.

Where one party to a suit has entered into a valid agreement with the other that the case may be decided on oath, to his statement on oath and the other party has made his statement, it is not open to the court to ask the former to make further statements or further evidence in the case, and if the court does so, it acts illegally and with material irregularity.

THIS was an application to revise an appellate decree of the Additional District Judge of Aligarh. The facts of the case are fully set forth in the judgment of the Court.

Munshi *Panna Lal*, for the applicant.

Mr. *N. C. Vaish*, for the opposite party.

DANIELS, J.:—This is an application for revision under the following circumstances. The suit was one on a promissory note. In the course of the suit the defendant agreed to abide by the oath of one of the plaintiffs, Mithu Lal. On a subsequent date, before the oath could be administered, he wished to withdraw from his application on the ground that Mithu Lal had been won over by the other plaintiff, Bihari, to swear a false oath. A witness was put in to prove the fact but both the courts below have concurred in rejecting his evidence as false. The plaintiff Mithu Lal took the proposed oath, and on the basis of his evidence the learned Munsif decreed the suit. The defendant appealed to the District Judge. The District Judge agreed with the Munsif as to the worthlessness of the evidence of collusion but remanded the case to the Munsif to take further evidence on the facts. On the basis of this evidence the learned Judge came to the conclusion that in reality there was no consideration for the promise and that the statement made by Mithu Lal on oath was false. From this he came to the conclusion that there must have been collusion between the two plaintiffs. Such a procedure on the part of the District Judge cannot be supported. It has the effect of entirely nullifying

* Civil Revision No. 54 of 1933.

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the agreement made by the defendant to abide by Mithu Lal's oath. The oath to be taken was in the ordinary form and may not be specifically covered by sections 8 and 9 of the Oaths Act. There is authority of this Court in the cases of *Muhammad Asghar Ali Khan* v. *Imtiaz Ali* (1) and *Kesho Ram* v. *Peare Lal* (2), that this does not affect the validity of the agreement. If the court, notwithstanding such an agreement, is to be at liberty to enter into evidence as to the truth or falsehood of the statement made, the effect in substance is to wipe out the agreement altogether; it might not as well have been entered into. When a party agrees to abide by the oath of the other party or of any particular witness, he clearly takes the risk of the witness swearing falsely. What he says in effect is: "Whatever this witness states on oath, I am prepared to accept as true and to have the case decided on the basis of it." The court below has in this case acted illegally and with material irregularity in entering into evidence on the question of consideration and in setting aside the decree of the Munsif. I accordingly allow the present application, and setting aside the decree of the learned District Judge restore the decree of the Munsif. Under the special circumstances of the case I make no order as to costs in this Court.

Before Mr. Justice Daniels

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RAJ PRATAP NARAIN SINGH (DEFENDANT) v. MAHANT RAM PRASAD BHARTHI (PLAINTIFF).*

Act (Local) No II of 1901 (Agra Tenancy Act), sections 36 and 167—Civil and Revenue Courts—Jurisdiction—Suit by grove holder to recover value of fruits taken by zamindar in excess of his share.

Held that section 36 of the Agra Tenancy Act, 1901, does not include the case of a zamindar gathering for himself more than the share to which he is entitled of the fruits of a grove, when such appropriation is not accomplished by making or compelling the tenant to deliver the fruits, although probably it was the intention of the framers of the Act to include such a case. A suit, therefore, by the tenant to recover his share of fruits so taken will lie in a Civil Court. *Gureebullah Puramanick* v. *Fukeer Mahomed Khulon* (3), referred to.

THIS was an application in revision against the decree of the Court of Small Causes at Deoria. The facts of the case sufficiently appear from the judgment of the Court.

Munshi *Haribans Sahai*, for the applicant.

Pandit *Narmadeshwar Prasad Upadhyaya*, for the opposite party.

* Civil Revision No. 41 of 1923.

(1) Weekly Notes, 1898, p. 200.
(2) (1923) 21 A. L. J., 307.
(3) (1868) 10 W. R., C. R., 203.

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RAM PARTAB NARAIN SINGH v. MAHOMED RAMZAN BEPARI (DAWSON).

DAWSON, J.:—The appeal raises a question of jurisdiction. The plaintiff is a grove holder and the defendant the zamindar. The suit was brought on the allegation that the defendant being entitled to one-fourth of the fruits of the grove had wrongfully appropriated one-half of the fruits. The suit was filed in the Small Cause Court, claiming the value of the fruits wrongfully appropriated. The defence was that the suit was cognizable only by the Revenue Court, being a suit contemplated by section 36 of the Tenancy Act, and that, therefore, the jurisdiction of the Civil Court was ousted by section 167 of the same Act. Section 36 covers claims by a tenant from whom any sum or produce has been exacted by his landlord in excess of the amount recoverable from him as an arrear of rent. The learned Judge of the court below framed an issue on the question of jurisdiction but omitted to decide it. The plaintiff's answer to the objection, however, is that the verb "to exact" implies something which the tenant has been compelled to pay against his will and does not apply to a case in which the landlord has gone to the grove and gathered the produce for himself. It is not disputed that the produce of a grove which the grove-holder is liable to render to the zamindar comes within the definition of rent, this having been held in more than one case, *e.g.*, *Roghubir Rai* v. *Madho* (1). The dictionary meaning of the verb "to exact" is in accordance with the interpretation placed on it by the respondent. The primary meaning as given in Murray's Oxford Dictionary is "to demand and enforce payment of." It does not cover the direct appropriation of produce on the spot. I have been referred to an old decision in *Gureeboollah Paramanick* v. *Enkeer Mahomed Kholoo* (2) in which the same view was taken. I have little doubt that the intention of the framers of the Tenancy Act was to include such a case as the present within the jurisdiction of the Revenue Court, and if section 36, as framed, does not cover it, it is merely because the possibility of such a case was not thought of at the time when the section was drafted. I must, however, interpret the section as it stands.

In the course of the argument an alternative plea has been put forward to the effect that the suit was excluded from the jurisdiction of the Small Cause Court by article 35 (ii) or article 43(A) of the second schedule to the Provincial Small

(1) (1917) L. L. R., 39 All., 605.
(2) (1868) 10 W. R., C. R., 202.

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Cause Courts Act. This plea is an after-thought and was not taken in the grounds of revision. Moreover, after reading the plaint, I do not find that the allegations made therein clearly amount to a criminal offence. The revision, therefore, fails and I accordingly dismiss it with costs.

Application dismissed.

APPELLATE CRIMINAL.

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Before Mr. Justice Ryves and Mr. Justice Daniels

EMPEROR v. UMED AND OTHERS *

Act No. XLV of 1860 (Indian Penal Code), sections 34, 37, 302—Murder—Several persons joining in beating another with lathis—Common liability of all

Where several persons join in beating another with *lathis*, and inflict such serious injuries on him that he dies shortly after the beating, all are guilty of the offence of murder, without distinction. *Emperor* v. *Shah Singh* (1), followed; *Emperor* v. *Bindu Singh* (2) and *Dhian Singh* v. *King-Emperor* (3) overruled.

THIS was an appeal by one Umed from his conviction and sentence under sections 148 and 304 of the Indian Penal Code, and in connection with this appeal three other persons, who had been tried and convicted along with Umed, were served with notice to show cause why their convictions should not be altered and their sentences enhanced. The facts of the case sufficiently appear from the judgment of the Court.

The accused were not represented in the High Court.

The Assistant Government Advocate (Mr. *R. Malcomson*) for the Crown.

RYVES and DANIELS, JJ.:—Niranjan, Banwari, Ranjit and Umed were committed to the Court of Session, at Mainpuri, on charges under sections 148 and 302, Indian Penal Code. The learned Sessions Judge convicted Umed under sections 148 and 304, Indian Penal Code, and convicted the remainder under sections 148 and 325. He sentenced Umed to transportation for life under section 304 and the other three to five years' rigorous imprisonment under section 325. Umed appealed to this Court. On his appeal being admitted by a learned Judge of this Court, notice was sent to Niranjan, Banwari and Ranjit to show cause why the conviction should not be altered in their case and the sentence enhanced accordingly. Niranjan has since died in jail. The notice has been

* Criminal Appeal No. 400 of 1923, from an order of Shekhar Nath Banerji, Sessions Judge of Mainpuri, dated the 9th of April, 1923.

(1) (1922) I. L. R., 45 All., 130.
(2) (1907) I. L. R., 29 All., 282.
(3) (1912) 9 A. L. J., 180.

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served on Banwari and Ranjit and no cause is shown on their behalf. We, therefore, take up the case of Umed on appeal and the case of Ranjit and Banwari in revision.

It is proved by the clearest evidence that Bhopal, an elderly Kachhi of Narayanpur, was mercilessly beaten by the four accused and one Ganpat who is absconding. There had been litigation between Bhopal on the one side and Niranjan and Banwari, who are brothers, on the other, in which Bhopal had been entirely successful, with the result that there was the bitterest enmity against him on the part of Niranjan and Banwari. Only very shortly before this occurrence Bhopal had obtained a decree under section 9 of the Specific Relief Act against them and was then putting his decree into execution. Bhopal was taken to the hospital at Mainpuri where he died on the 13th of January. The medical evidence shows that he was most mercilessly beaten and his skull was fractured and several ribs were broken.

The evidence against the accused is [illegible]. It consists of several eye-witnesses who saw the assault in broad daylight and who knew all the accused. In the first report, which was made on information given by Bhopal himself, all five are named. The learned Sessions Judge has come to the conclusion that on the evidence the apparent intention of the accused was to cripple Bhopal and not to kill him. He gathers this from the statements of the witnesses who say that the accused were saying that they were beating Bhopal so that they would not leave him in a condition to fight a case in Mainpuri. We should have drawn a very different inference from these remarks, but it seems to us quite unnecessary to do so. There is no doubt that all the five accused joined in beating Bhopal when he was on the ground with *lathis* and they inflicted such serious injury to him that he died two days afterwards. They must have known that at the least they were causing injury which was likely to cause death, and if death resulted, they are all guilty of murder. In such cases it is immaterial by whose *lathi* the fatal injury is inflicted. The learned Judge has drawn a distinction between Umed and the other three accused before him, a distinction which we are entirely unable to appreciate. It may be that Umed inflicted the first blow or even the blow on the head but that does not [illegible] his case from that of the others. They all joined in the attack and the death was the result of the beating inflicted by them all jointly. The

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learned Sessions Judge has relied on the case of *Emperor* v. *Bhola Singh* (1). That case has not been followed in several later decisions and can no longer be treated as good law; *vide Emperor* v. *Ram Newaz* (2), *Emperor* v. *Hanuman* (3) and *Emperor* v. *Gulab* (4). In this case the decision of a single Judge in *Emperor* v. *Chandan Singh*, which followed *Emperor* v. *Bhola Singh* (1), was expressly overruled. A similar decision reported in *Dhan Singh* v. *King-Emperor* (5) was dissented from in *Emperor* v. *Hanuman* (3). The latest decision on the point is that of *Sipahi Singh* v. *Emperor* (6). In our opinion all the accused ought to have been convicted of murder, and if they had been so convicted and sentenced to death, we should not have interfered. As it is, we alter the conviction in the case of Umed from section 304 to section 302 and in the case of Banwari and Ranjit from section 325 to section 302. We maintain the sentence of Umed of transportation for life and enhance that of Banwari and Ranjit to transportation for life with effect from the 9th of April, 1923. The sentence under section 148 will remain and run concurrently.

Order modified.

APPELLATE CIVIL.

Before Mr. Justice Lindsay and Mr. Justice Sulaiman.

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UMAN SHANKAR AND ANOTHER (PLAINTIFFS) *v.* MUSAMMAT AISHA KHATUN (DEFENDANT)*

Hindu Law—Hindu widow—Widow taking possession of the property of her deceased husband, but treating it as her own absolute property—Adverse possession.

Where a Hindu widow—the widow of one of four brothers who were not definitely shown to have separated—took possession of the share of her deceased husband, had her own name recorded in respect thereof, and dealt with the property for a series of years as if it were her own absolute property, it was *held* that, in the absence of any admission on the part of the widow that her possession was no more than that of the widow of a separated Hindu in possession as such of the property of her late husband, her possession must

* First Appeal No. 169 of 1921, from a decree of Ali Ausat, Subordinate Judge of Aligarh, dated the 26th of January, 1921.

(1) (1907) I. L. R., 29 All., 282
(2) (1913) I. L. R., 35 All., 506
(3) (1913) I. L. R., 35 All., 560.
(4) (1918) I. L. R., 40 All., 686
(5) (1912) 9 A. L. J., 180
(6) (1922) I. L. R., 45 All., 130

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Lalta Sajwan [illegible] v. Musammat Amir Begam

[illegible] taken to be adverse to the [illegible] [illegible] Mussammat [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible] [illegible]

THE facts of this case are fully set forth in the judgment of the Court.

Babu Piari Lal Banerji, for the appellants.

Mr. S. A. Haidar, Mr. [illegible] Husain, and Munshi Iqbal Husain, for the respondents.

LINDSAY and SULAIMAN, JJ.:—This is a [illegible] appeal arising out of a suit for recovery of possession [illegible] owners of [illegible] Lal, the alleged last male owner. It was the plaintiffs' case that Sajwan Lal who was a separated Hindu died many years ago and on his death Musammat Dulari his widow entered into possession of his estate, that she made a transfer of the [illegible] in dispute without any legal necessity in the year 1913 to Lalta Prasad [illegible] [illegible] March, 1917, [illegible] to the defendant [illegible] that Musammat Dulari died without [illegible] and the [illegible] are entitled to [illegible].

On behalf of the contesting defendant it was denied that Dulari's husband S[illegible] Lal was separate from his other brothers, and it was further pleaded that Musammat Dulari without any right and title had entered into [illegible] and remained in adverse possession for more than twelve years and had acquired title to the [illegible]. It was also pleaded that in any case there was legal necessity for the transfer.

The learned Subordinate Judge was of opinion that the evidence was insufficient to establish that [illegible] Lal had separated from his brother at the time of his death. He found that Musammat Dulari had entered into adverse possession and that therefore the plaintiffs' claim was barred by time. On the question of legal necessity he found that the defendant had failed to establish it. The suit however was dismissed on the finding that the family had been joint.

In appeal it is contended that it is proved that [illegible] Lal was a separated Hindu and, further, that even assuming that he was joint with his brothers, Musammat Dulari's possession, in consequence of her own admissions, was never adverse and that at best she only [illegible] a Hindu widow's estate.

(1) (1895) I. L. R., 22 Calc., 445.
(2) (1920) I. L. R., 42 All., 152.
(3) (1916) I. L. R., 38 All., [illegible].

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On the question of jointness or separation the documentary evidence is practically nil. The earliest document which we have on the point is an application, dated the 21st of March, 1896, filed by Musammat Dulari in the Revenue Court for a perfect partition of her share which was described as being 20 out of 54 shares in a 5 biswas share of the mahal. On the 21st of May, 1896, another application on behalf of Hori Lal was also presented desiring partition. These applications were resisted by an objection, dated the 28th of May, 1896, filed by Musammat Mano Kunwar on behalf of Kirpa Shankar and Bodh Raj. In this objection she asserted that the family had all along remained joint and that Musammat Dulari had no right to possession or to have any share separated. This objection does not appear to have been pressed at all and was ultimately disallowed. The Revenue Court apparently directed the partition to be effected and Musammat Dulari's share was actually separated. Afterwards we find that on the 20th of December, 1898, Musammat Dulari executed a mortgage deed in favour of Maharaj Tika Ram in which she stated that the property mortgaged had belonged to her husband and was in her possession but that she was the owner of it. The amount borrowed was taken partly in order to pay off a bond of the 5th of April, 1897, said to have been executed in order to meet the expenses of the Revenue Court litigation as well as for cash received at the time of registration. On the 26th of April, 1903, she executed a second mortgage deed in favour of the same Tika Ram in order to pay off the amount due on the previous mortgage deed of 1898 as well as some parole debts due to the mortgagee and for a further advance in order to meet certain miscellaneous debts and expenses of her food. These mortgage deeds remained unchallenged for a large number of years.

On the 13th of February, 1911, she executed a sale-deed of the entire share in this village in favour of Chaitram for a sum of Rs. 2,000. The amount was said to have been required in order to pay off the earlier mortgage deed as well as some previous debts and there was a further advance of Rs. 1,200. In this sale-deed she did state that the property sold was the zamindari property left by her husband. As we have already said, this was followed by the sale-deed of the 15th of March, 1917, which is the subject matter of dispute in this case. We can find nothing in any of these documents which would necessarily show that her husband at the time when he died

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had been separate from his brothers. The mere fact that the widow's name is entered in the revenue papers does not in our opinion necessarily raise the presumption that she is the widow of a separate Hindu.

Coming to the oral evidence adduced by the plaintiffs we find that that evidence, too, is not reliable. The learned Subordinate Judge who heard the witnesses did not believe them. The first witness is Pitambar Das who stated that all the brothers of Sarjiwan Lal lived together. They were partners in most business, house and everything. He admits, however, that he is by relationship connected with the plaintiff and that this alleged partnership must have taken place prior to his attaining the age of discretion. It is admitted that all the brothers lived in one and the same house, some living in the upper storey and others in the lower storey. There is nothing to show that the name of these brothers were separately entered during their life time against the zamindari property owned by them. This witness in cross-examination stated that it was 5, 6, 8 or 10 years after Sarjiwan Lal's death that the name of Musammat Dukari was entered in the revenue papers.

If this statement were to be correct it would follow that she could not have got her name entered by right as the widow of a separate Hindu.

The next witness is Hazari Lal, whose statement in examination-in-chief was to the same effect, but in cross-examination he too admitted that Sarjiwan Lal and his brothers did not separate in his presence; that they did not divide the amount of profits in his presence and that they lived in separate portions of one and the same house. Balki Ram, one of the brothers, lived in the upper storey and the other brothers in the lower storey. The remaining three brothers also lived in the upper storey. This witness also is related to the plaintiffs by family relationship and was not considered an independent witness by the court below.

The third witness Kishan Narain also stated in a general way that the brothers of Sarjiwan Lal were separate from each other. In cross-examination he had to admit that he did not know who used to make the collections in respect of the zamindari property.

The fourth witness Gauri Prasad in cross-examination stated that as far as he knew Sarjiwan Lal and his brothers did no work except collecting rents from the zamindari property;

that Sarjiwan Lal and his brothers did not divide the income in his presence and that Musammat Dulari obtained possession of the estate not on Sarjiwan Lal's death but on the death of Indarjit; that Indarjit died 20 or 22 years ago and as long as he was alive he himself was in possession of the property and it was he who used to give money to Musammat Dulari. If this statement of the plaintiffs' own witness is to be believed it would destroy the plaintiffs' case and would show that Musammat Dulari never obtained possession as a Hindu widow as long as the surviving brother Indarjit was alive; that it was somehow or other after Indarjit's death that she obtained possession of the property.

The last witness on the point is Murad Lal who stated that he had seen Indarjit and Dulari separate since 1878, but in cross-examination he admitted that he saw Indarjit and Dulari separate in mess only and in no other way. It is admitted by the other witnesses that all the branches of the family lived in one and the same house.

It is true that the oral evidence produced by the defendant is even worse. Banke Lal who was only 56 years of age stated that he had seen Sarjiwan Lal and Indarjit and found them living and dining together. He stated that he himself used to live and dine with them. In cross-examination however he could not fix the exact date. He had said originally that he was appointed patwari in 1875 and that he was living in the house of Indarjit in 1877 or 1878. In cross-examination, though he repeated this statement yet he said that during the days when he was living with Sarjiwan Lal he was not a patwari at all. His statement was to the effect that Dulari lived separate from Indarjit and that it was after the death of Sarjiwan that she became separate and that she was separate also as regards food etc.

The only other witness is one Abdul Hafiz who himself has no personal knowledge of the matter.

There can be no doubt that the presumption of law was in favour of the jointness of all the four brothers. The plaintiffs, who came into court on the allegation that they were separate, had to establish it by clear and cogent evidence. The documentary evidence, we have already pointed out, is altogether inconclusive. The oral evidence also is, under the circumstances suggested above, altogether unreliable. In this view of the matter we find it impossible to differ from the view

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taken by the learned Subordinate Judge that the plaintiffs have failed to prove that the four brothers were [illegible].

It is however contended on behalf of the appellants that even assuming that the four brothers were joint, the possession of Musammat Dukro was never adverse. Reliance is placed on the statement contained in the [illegible] deed of 1886 and the allegation of 1911 to the effect that the property transferred had been [illegible] by the lady from her deceased husband. Although these statements profess to show the origin of her title, it does not follow that these statements necessarily imply that at that time she was not asserting her full ownership but was only putting forward a limited interest in the estate. In 1886 when she applied for partition there was no admission on her behalf that she was only a limited owner. The evidence as to when and how she obtained possession is practically nil. Some of the plaintiff's own witnesses have stated that she entered into possession many years after Sarju Lal's death, one witness going so far as to say that he obtained possession after Indarjit's death. Under these circumstances, we are bound to hold that there is absolutely nothing to show how she [illegible] obtained possession of the estate and when and how her name was entered in the revenue papers. All that we know is that in the year 1896 she was a co-sharer when she applied for partition in the Revenue Court as against the other co-sharers. From this conduct of hers no inference can be drawn one way or the other. The subsequent admissions also are not conclusive on the point. It was laid down by their Lordships of the Privy Council in the case of *Lachhan Kunwar* v. *Manowath Ram* (1) that "unless it was clearly shown that when the widow took possession she professed to do it as claiming only the limited estate of a widow it would be impossible to hold that the rights of the other claimants were not [illegible]."

In the present case, we have already said, there is nothing whatsoever to show how she got into possession. It may be that she got into possession in an adverse title to the estate or it may be that she obtained possession amicably or with the consent of the other members. So long, however, as the plaintiffs have not shown that she entered into possession of the estate with an assertion of only a limited interest, it seems to us impossible to hold that her possession had all along remained either permissive or qualified. Her subsequent

(1) (1894) I. L. R., 22 Calc., 445.

conduct, namely, the execution of the mortgage deeds, would rather go to show that she was all along treating herself as full owner of the property. The case of *Satgur Prasad* v. *Raj Kishore Lal* (1) is somewhat similar inasmuch as in that case there were also a number of admissions of Musammat Dilla Kunwari that she had acquired the property as heir to her husband. These admissions however were not taken to necessarily involve the legal inference that she was asserting only a limited interest and not her absolute right. The learned vakil for the appellants relies on the case of *Baijnath Prasad Singh* v. *Tej Bali Singh* (2); in particular on the observations made by one of the learned Judges at page 624. That case, however, was quite a different one. There the lady was not in possession of the property as a trespasser but only asserted a Hindu widow's estate. As was pointed out by the learned Chief Justice at page 636, her possession could be legally explained on the basis of a will by her late husband as well as on the basis of custom set up in the case. When the case went up in appeal to their Lordships of the Privy Council the question of adverse possession was altogether dropped. That case therefore is in our opinion no authority for the contention advanced on behalf of the appellants.

The result therefore is that in our opinion the lady must be deemed to have remained in adverse possession of the property for more than twelve years and as having asserted her full ownership. Under these circumstances the plaintiffs' claim is barred by limitation. The appeal accordingly fails and is hereby dismissed with costs.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Piggott.

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June, 21.

KAPUR CHAND (OPPOSITE PARTY) *v.* KANHAIYA LAL (APPLICANT).*

Execution of decree—Res judicata—Series of applications relating to the execution of a decree—Final determination of a necessary issue between the parties—Court not competent to go behind that determination on a subsequent application for execution.

In the case of a decree passed in a suit against a firm, there is nothing to prevent a succession of applications for execution directed against persons who are ascertained to be, or believed to be, partners in the particular venture out of which the decree has arisen. But if there has been a previous application, in which there has been a definite decision affecting a particular piece of property or a particular person, and that decision has been allowed to become a final decision between the parties, then if in any subsequent proceedings, *e.g.*, on an application under order XXI, rule 50 (2), the point again becomes material, the parties are bound by that previous decision and the matter cannot be re-opened.

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* Appeal No. 173 of 1921, under section 10 of the Letters Patent

(1) (1919) I. L. R., 42 All., 122.

(2) (1916) I. L. R., 38 All., 590.

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KAUK CHAND v. KANHAIYA LAL.

THIS was an appeal under section 10 of the Letters Patent from a judgment of MR. JUSTICE WALLACH [illegible] from that of MR. JUSTICE WALSH, reported in I. L. R. 44 All., 130) [illegible] a decree of BABU LALJI PRASAD, Subordinate Judge of Banda. The facts of the case are fully stated in the judgment of the Court.

Mr. A. P. Dube, for the appellant.

Babu *Lalit Mohan Banerji*, for the [illegible].

MEARS, C. J. and PIGGOTT, J.: On the 9th of April, 1915, a firm, Bhairon Prasad and Mahadeo, borrowed Rs. 2,500 on a promissory note, the money having been lent by one Gaj Raj. On the next day the firm borrowed a similar amount from another firm, and both these notes [illegible] were purchased by Kauk Chand Lal, the [illegible] in this matter. On the 10th of August, 1916, Kauk Chand Lal brought a suit for the recovery of the Rs. 5,000 and interest. On the 20th of November, 1916, the suit was compromised by one Mangli Prasad. At that date Mangli Prasad had a younger brother Phul Chand and a still younger brother, by name Suraj Karan, who was a minor. Mangli Prasad, [illegible] to act as a member of the firm, agreed in writing to pay Rs. 6,120 in certain instalments, assented to the insertion of the usual default clauses in the compromise and set aside certain immovable property, which he declared to be [illegible] to the due discharge of this debt. In the document of compromise he stated that Phul Chand and Suraj Karan were his brothers, and he spoke of them as joint owners with himself in the property specified at the foot of the deed, and also as members of the firm. That compromise was embodied in a decree of the 28th of November, 1916. [illegible] Lal, no doubt, was confident that he had got a decree which, if default were made, could readily be put into execution. Default was made, and on the 30th of July, 1917, the respondent applied for execution. On the 8th of August he asked for an injunction restraining the transfer of, or creation of charges over, this property, and on the 18th of August this property was attached. On the 8th of September and again on the 12th of September, 1917, Phul Chand for himself and his younger brother filed two applications. The first application was to set aside the decree. The second application was to set aside the attachment on the ground that the property sought to be attached, and which was the subject of hypothecation in the compromise decree, was

wholly and entirely the property of Phul Chand and Suraj Karan and the firm had no concern with it at all, and that they the two younger brothers, were separate from Mangli Prasad Objections were lodged by the respondent on the 3rd and 10th of November, and amongst these objections the present respondent stated that it was not necessary in the suit to disclose the names of all the persons who were the partners. He further stated that Mangli Prasad had acted throughout as *karta* of the joint Hindu family, that he and his two brothers were joint, that the business was the business of the family, and the property comprised in the compromise decree was property of the joint family. The grounds of the application of the 12th of September alleged, as we have stated, a separation by Phul Chand and Suraj Karan from Mangli Prasad; it gave no date of that separation and no particulars other than the assertion that as the result of that separation Mangli Prasad had been given a block of property elsewhere as his share, whilst they had got other property, comprising *inter alia* the property sought to be taken in execution

It appears from the very scanty record that lies before us that the learned Subordinate Judge apparently grouped the two applications of the 8th and 12th of September together. We have studied with great care, and with the assistance of Mr. *Dube* and Mr. *Lalit Mohan Banerji*, the order that he passed, because it is agreed that, if it should transpire that he in fact decided as a relevant matter that which at a later stage (in May, 1919) the learned Subordinate Judge was again asked to decide, the decision of MR. JUSTICE WALSH, to which we will refer later, will be the decision to be preferred.

The exact text of the order is to be found at page 140 of I. L. R., 44 Allahabad. The order sheet of the 6th of September, 1918, runs as follows:—

"The decree-holder has obtained a simple money decree against defendant No. 1, that is, the firm Bhairon Prasad and Mahadeo. The present objectors were not parties to the decree. Mangli Prasad appeared for the firm These objectors are brothers of Mangli Prasad. They were never disclosed in the plaint as partners The property attached has not been proved to be the property of the firm. Under the circumstances the attached property must be the property of the objectors as well as that of the judgment debtor, Mangli Prasad, representing the firm. Ordered, 2/3rd share in the property attached be released; parties to bear their own costs."

Now it is necessary to consider what the parties were contending for Kanhaiya Lal, the decree-holder, wanted the attachment of property which, under the compromise decree,

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had been [illegible]. By the order of the three brothers on the assertion that it was property which belonged to the firm and that the three brothers constituted a joint family. The order of the Judge involved, in effect all, a finding by him that the status of the family had undergone a change. He evidently accepted the story of Phul Chand and Suraj Karan that there had been a separation. He appears to have believed what very evidence was put before him that their status had altered from that of joint tenants to tenants-in-common, because he treated the property, not as the objectors wished it to be treated, as belonging wholly to them, but treated it on the basis that each brother had an equal one-third share. He must have decided that the two younger brothers were not partners in the firm, and he also decided clearly that it was not proved that the property, though represented by Mangli Prasad to be the property of the firm, was in truth the property of the firm. It is on those findings, erroneous as they may have been, that the order of the 6th of September, 1918, was based, and it is [illegible] cannot be challenged now. The decree-holder, dissatisfied as he may well have been, did not appeal from that order, nor did he, under order XXI, rule 63, make this question, as to whether that property attached in the execution of decree belonged to the firm or not, a matter for a suit. It is said that the decree-holder could not have appealed; but we are by no means satisfied with that. We cannot decide that matter because it is conceded that he certainly had a right to proceed under order XXI, rule 63. Instead of taking a course in which there would have been regular pleadings and definitely formulated issues, he, on the 14th of September, applied to the Judge for review and submitted to the Judge that the order of the 6th of September was an erroneous one and asked for a reconsideration of the matter. The learned Subordinate Judge is said to have taken no steps in this matter until the 3rd of May, 1919, on which day he passed an order saying that he had already decided that the objectors were not parties to the decree, and the property not proved to be the property of the firm, that there was no new ground disclosed for a review, and that there was no mistake apparent on the face of the record. On these grounds he dismissed the *ex parte* application. Three days later, the decree-holder made an application asking that the liability of the opposite parties might be determined and that leave might be given to execute the decree against

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them. On the 23rd of June, 1920, the Subordinate Judge disposed of that application, holding that the order of the 6th of September, 1918, did not operate as a bar to this application, and that it might be entered upon and decided. He went into the evidence on either side and made an order favourable to Kanhaiya Lal, the present respondent. The objectors appealed to this Court and the matter was considered by MR. JUSTICE WALSH and MR. JUSTICE WALLACH on the 9th of August, 1921. There was a difference of opinion between them, MR. JUSTICE WALSH coming to the conclusion that the order of the 6th of September, 1918, had involved issues on which decisions had been given and that by the application of the 5th of May, 1919, the respondents were seeking to reopen questions which had become final. MR. JUSTICE WALLACH was of opinion that the order of the 6th of September, 1918, did not exclude an application under order XXI, rule 50 (2).

It is in these circumstances that the matter has come up before us, and the question for our determination is, ought the Subordinate Judge to have entertained the application of the 5th of May, 1919? or ought he, without going into the evidence on the merits, to have held himself precluded by virtue of the previous struggle between the parties which was concluded by the order of the 6th of September, 1918?

We are of opinion that the judgment of MR. JUSTICE WALSH is to be preferred, for these reasons. The position of the respondent when he first sought to obtain execution was as follows:—He could have limited his execution to the partnership property, relying upon the fact that service had been duly effected upon Mangli Prasad, a partner. He might also have proceeded personally against Mangli Prasad. So that he had a dual remedy by the mere fact of service on Mangli Prasad, *i.e.*, a remedy against the whole of the property of the partnership, and a remedy against the personal property and person of Mangli Prasad. Because of the form of the compromise decree the respondent naturally sought the property therein pointed out and he proceeded under order XXI, rule 50 (1); and we regard his application as being limited exclusively to property which he believed, on the representations of Mangli Prasad, to be partnership property, certain of being attached. When in reply to the attachment of the 18th of August Phul Chand and Suraj Karan filed applications, the Judge, before allowing execution, had to be satisfied that the property to be attached

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was the property of the partnership. Having regard to the form which the applications of the 8th and 12th of September took and the form of the objections of the 3rd and 10th of November by the plaintiff, it would appear that incidentally, but nevertheless necessary to the determination of this question whether the property was the property of the partnership, there was the question of the status of the family and the membership of the firm, and the Judge by the terms of his order sheet and by the statement made by him when dismissing the application for review, does undoubtedly show that he dealt with all those three matters.

As regards the order of the 6th of September, 1918, as we have already said nobody in either court has had a good word to say for it. It appears to us to be erroneous; but the decision may have been a right one, inasmuch as it must have been dependent upon evidence produced before the Subordinate Judge, which is not before us. The respondent complains that by that erroneous order of the 6th of September, 1918, he has been grievously injured, and that having paid money for the promissory note which formed the basis of the action, and having obtained a compromise into which no other business man would have entered, he has been by trickery and process of law deprived of his recourse against what he still undoubtedly believes to be partnership property, and property of a joint Hindu family. MR. JUSTICE WALSH, in his judgment, took the line that the respondent was himself largely to blame for this and we feel there is some force in that observation because it was unwise of him, having got what he considered to be plainly a perverse decision of the 6th of September, to apply for a review to the same Judge. His proper course, if he took the view that the order of the 6th of September was not appealable, was to institute a suit and have the matter carefully and properly threshed out. He did not do that, and such issues as can fairly be presumed to have necessarily been before the Subordinate Judge and to have been decided by him, have been finally decided, whether such issues were rightly or wrongly decided. That was the position on the 5th of May, and we have already said that we are of opinion that on that day the learned Subordinate Judge, in going into the matter on the application under order XXI, rule 50 (2), was going over, as regards some of the issues, the same ground which the previous Judge had covered by his decision.

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It is quite true, as the respondent has pressed upon us, that successive steps may be taken in execution; that is to say, there is nothing to prevent several applications being made, directed against and linked into partnership of private property. There is nothing to prevent a succession of applications directed against persons who are ascertained to be, or believed to be, partners in the particular venture out of which the decree has arisen. The limitation, however, that is imposed on all these applications is that if there has been a previous application, in which there has been a definite decision affecting a particular piece of property or a particular person, and from that decision nothing has been done by way of appeal or institution of suit, if either of these methods was available, that decision is a final decision between the parties; and if in any subsequent proceedings the point again becomes material, the parties are bound by that previous decision and the matter cannot be re-opened. To that extent, and that extent only, is there limitation on the successive applications in execution. We think that the objection which was taken to the learned Subordinate Judge going into this matter on the 5th of May, which was that he was going to cover, as regards material matters, points which had been discussed and settled finally between the parties in September, 1918, was a right objection, and he ought not to have entertained the application of the 5th of May.

The result, therefore, is that we set aside the order of this Court and also the order of the court below, and in lieu thereof we dismiss the application presented by the respondent Kanhaiya Lal under order XXI, rule 50 (2). Under the circumstances we leave the parties to bear their own costs throughout.

Application dismissed.

Before Sir Grimwood Mears, Knight, Chief Justice, and Mr. Justice Piggott.

1923 June, 21.

SANTI LAL AND ANOTHER (JUDGMENT-DEBTORS) v. RAJ NARAIN AND ANOTHER (DECREE-HOLDERS).*

Civil Procedure Code, section 109—Appeal to His Majesty in Council—"Final order"—Order determining the substantial question in issue and directing the preparation, by the executing court, of a decree under order XXXIV, rule 6, of the Code of Civil Procedure.

In an appeal arising out of the execution of a mortgage-decree valued at over Rs. 10,000, the High Court overruled the lower court on the only really substantial question in issue, namely that of limitation, and passed an order which amounted to a direction that a decree under order XXXIV rule 6, of the Code of Civil Procedure should be prepared, the details of which were left for the execution court to settle. *Held*, that the order might

* Application No. 6 of 1923, for leave to appeal to His Majesty in Council.

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fairly be described as a final order within the meaning of that expression as used in section 109 of the Civil Procedure Code, and that a certificate might be granted that the case was a fit one for appeal to His Majesty in Council. *Ram Nath Dass* v. *Sukhan Lal* (1), and *Sheo Baran Singh* v. *Official Receiver, Nursinghpur* (2), distinguished. *Sayad Mohsin Hussain* v. *Mussamat Fulan Bibi* (3), referred to.

THIS was an application for leave to appeal to His Majesty in Council. The facts of the case sufficiently appear from the judgment of the Court.

Pandit *Mohan Lal Sanyal*, for the appellants.

Munshi *Narain Prasad Asthana*, for the respondents.

MEARS, C.J., and PIGGOTT, J.:—This is an application for leave to appeal to His Majesty in Council against an order of this Court, dated the 4th of December, 1922. There are materials on the record quite sufficient to show that the value of the subject-matter in dispute between the parties in the proceedings resulting in this Court's order above referred to exceeded Rs. 10,000. This Court did not affirm the decision of the court below. What is objected to is that the order in question is neither a decree nor a final order within the meaning of section 109 *(a)* of the Code of Civil Procedure. On behalf of the applicant it is contended that the order in question is, at any rate, a final order within the meaning of the clause above referred to. Apart from this, it is contended that, under the circumstances, the case ought to be certified as a fit one for appeal to His Majesty in Council, merely on the ground that it is an appeal from an order of this Court, and any difficulty as to whether the order in question was or was not a final order could be avoided by applying the provisions of section 109 *(c)* above referred to. It is necessary to examine the circumstances under which this matter came to the Court. It was an execution appeal arising out of a mortgage decree. The decree-holders were the appellants in this Court. They had obtained execution of their mortgage decree in a somewhat unusual, but perfectly lawful, manner. They had exhausted the whole of the property covered by the decree, and they alleged that a very considerable portion of the decree still remained unsatisfied. They applied to the court below for the preparation of a decree covering this unsatisfied balance, under the provisions of order XXXIV, rule 6, of the Code of Civil Procedure. The office report prepared at the time the application was made is on this record. It is to the effect that the amount due under the decree on the date of the said report,

(1) (1909) I. L. R., 31 All., 545.
(2) (1911) I. L. R., 33 All., 391.
(3) (1894) I. L. R., 17 All., 112.

namely, the 23rd of May, [illegible] Rs. 32,119-7-6, and that the total amount realized [illegible] of the mortgaged property was only Rs. 18,600. We [illegible] say that the parties are necessarily bound by these [illegible] They may require further investigation in the court below. We refer to them, however, as showing that *primâ facie* [illegible] amount of the subject-matter in dispute was considerably in excess of Rs. 10,000. The judgment-debtors objected that the application for a decree under order XXXIV, rule 6, was barred under the appropriate article of the Indian Limitation Act. The execution court upheld this contention and dismissed the application of the decree-holders. On appeal, a Bench of this Court held that the application was within time. The order of the court below was, therefore, set aside and the execution court was ordered to re-admit the application of the decree-holders on to its file of pending applications and proceed with it according to law. Under the circumstances [illegible] directed to a direction that a decree under order XXXIV should be prepared, the details of which were [illegible] execution court to settle. It is against this order that the judgment-debtors now desire to appeal to His Majesty in Council.

We have been referred to [illegible] of this Court, namely, *Baij Nath Dass* v. *Sohan Lal* [illegible] and *Ahmad Husain* v. *Govind Krishna Narain* [illegible] leave to appeal to His Majesty in Council against [illegible] by this Court under order XLII, rule 23, of the [illegible] Procedure was refused on the ground that the order [illegible] be appealed against in each case was neither a decree [illegible] Authority on the other side is to be found in *Sayad Muzhar Hossein* v. *Mussamat* [illegible] leave to appeal was refused by this [illegible] under the section of the former [illegible] corresponding to order XLII, rule [illegible] special leave to appeal was [illegible] The learned Judges of the Chief Court in *Baij Nath Dass* v. *Sohan Lal* [illegible] case from the one then before [illegible] order passed by this Court on the point which went to the [illegible] raised being of a substantial [illegible] learned Judges were of opinion that [illegible] to grand

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by this Court of which it could be said that it had determined the only really substantial question in issue between the parties, the precedent set by their Lordships in *Mazhar Hossein's* case ought to be followed and leave to appeal granted. The present seems to us such a case; it is clearly distinguishable from either of the two cases above referred to in which leave to appeal was refused. It is only necessary to glance at the reports in those two cases to see that the facts were materially different. In the case now before us this Court disposed of one substantial objection raised by the judgment-debtors to the decree-holder's application. The case was sent back to the executing court because the steps which remained to be taken, in order that a proper decree under order XXXIV, rule 6, might be prepared, could more conveniently be taken in that court. We are by no means certain that under these circumstances the order of this Court might not fairly be described as a final order within the meaning of that expression as used in section 109 of the Code of Civil Procedure. In any case we are satisfied that we ought to follow the precedent set in *Mazhar Hossein's* case and grant the certificate asked for. We order accordingly

Application allowed.

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June, 22.

Before Mr. Justice Lindsay and Mr. Justice Solomon

SHEO NANDAN AND OTHERS (DEFENDANTS) v. BALGOBIND MISRA AND ANOTHER (PLAINTIFFS).*

Act (Local) No. II of 1901 (Agra Tenancy Act), section 9. Pre-emption—Fixed-rate tenancy. Suit for pre-emption of land once a fixed-rate tenancy, but subsequently converted into zamindari. Presumption. Applicability of section 9 to a suit not between a landlord and tenant.

The subject of a suit for pre-emption consisted of certain plots of land which at the settlement had been held, and recorded, as fixed-rate tenancies, but thereafter, by reason of partition proceedings, had fallen into the proprietary mahal of the fixed rate tenants themselves

Held that the legal consequence of the partition was to bring about a merger, a complete absorption of the fixed-rate tenancies into zamindari property, which could therefore be the subject of pre-emption

Held, further, that section 9 of the Agra Tenancy Act, 1901, would not have the effect of rendering the suit unmaintainable. That section provides that the entry therein referred to shall be conclusive proof that a certain person was at the time the entry was made a fixed-rate tenant of certain land, but there is no presumption that the character of the land in question may not subsequently have been altered, and evidence of such alteration may be adduced. *Jai Nath Pathak* v. *Kalka Upadhya* (1), referred to.

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* Second Appeal No. 1803 of 1921, from a decree of A. G. P. Pullan, District Judge of Benares, dated the 21st of July, 1921, confirming a decree of Raj Behari Lal, Additional Subordinate Judge of Jaunpur, dated the 28th of February, 1921.

(1) (1912) I. L. R., 34 All., 285.

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SHEO NANDAN v. BALGOBIND MISRA.

Per LINDSAY, J, (SULAIMAN, J. *dissentiente*),—The scope of section 9 is strictly limited and the rule laid down in that section can only be applied in litigation arising between a landlord and tenant when the matter in issue between them is the nature of a tenancy.

THE facts of this case sufficiently appear from the judgment of the Court.

Maulvi *Muhammad Abdul Aziz*, for the appellants.

Mr. *N. C. Vaish*, for the respondents.

SULAIMAN, J. :—This is a defendants' appeal arising out of a suit for pre-emption. The vendor Gaya was a zamindar of *patti* Subhao. He executed two sale-deeds in favour of defendants Nos. 2 and 3, and defendant No. 7, respectively. Under the first sale-deed he purported to sell his 2 annas and 8 pies share in the *patti*, and under the second a number of plots specified therein as fixed-rate holdings. The defendants Nos. 2 and 3 are the sons of Sheo Nandan, defendant No. 1, and defendant No. 7 is his wife. The plaintiffs brought this suit to pre-empt both these transfers on the allegation that they together constituted one transaction in favour of the defendant family. There was also some dispute as to the actual sale consideration. The plaintiffs alleged that they were co-sharers in the same *patti* with the vendor, and under the custom prevailing in the *mahal*, they were entitled to pre-empt the sale.

On behalf of the defendants the existence of the custom of pre-emption was denied. It was pleaded that the sale considerations were truly entered in the two documents and that these were separate transactions. It was further pleaded that the plaintiffs were precluded under the provisions of section 9 of the Agra Tenancy Act from saying that the plots were not fixed-rate holdings but zamindari properties; and that there being no custom of pre-emption with respect to tenancy holdings, the claim with respect to these plots was not maintainable.

The court of first instance decreed the claim, holding that there was a custom of pre-emption in the village, and that the fixed-rate tenancies had become proprietary interests and were liable to pre-emption. On appeal the learned District Judge accepted the findings of the court of first instance and dismissed the appeal.

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SHEO NANDAN v. BAGHOBOO MISRA

As there has been some dispute with regard to the constitution of this *mahal*, I think it desirable to mention the following facts.

In the settlement of 1837 the plots mentioned in the plaint were recorded as fixed-rate holdings of Subhao's family. In the year 1838 there was a perfect partition of the entire village, which was divided into three distinct *mahals*. *Mahal* Bishen Dayal consisted of five *pattis*, three of which were real (*asli*) *pattis*, the other two were *shamil pattis*. The evidence of the patwari, supported by the entries in the *khasra* and the *khatauni* which are not contradicted by any other evidence, makes it quite clear that all the fixed-rate holdings belonging to Subhao's family were, at the partition, placed in *patti* Subhao, of which Subhao's family was the sole proprietor. The effect of the partition, therefore, was that the fixed-rate tenants ceased to be the tenants of the other co-sharers of the *mahal*, and all their fixed-rate holdings were included in their own *patti*. The legal consequence of such a change obviously was to bring about a merger, a complete absorption of the fixed-rate tenancies into zamindari rights. After the partition of 1838, therefore, there can be no doubt that in the eye of the law the fixed-rate holdings ceased to exist. The rights and interests of the owners were only those of ordinary proprietors. It is admitted, however, that in the *khatauni* these plots continued to be recorded as fixed-rate holdings.

The contention on behalf of the defendant appellant is that it is not open to the plaintiff to show by any evidence that these plots are other than fixed-rate holdings. Strong reliance is placed on section 9 of the Agra Tenancy Act and the argument is that so long as the revenue papers have not been actually corrected, the presumption is absolutely conclusive that these plots are fixed-rate holdings to the present day. Section 9 in terms is not confined to a dispute between landlord and tenant. The words "as against a landlord" are not there at all. The section is quite general in its scope and is applicable to all cases where a dispute as to the nature of the tenancy arises, no matter whether that dispute arises against a landlord or not.

It is conceivable that such a dispute may arise in proceedings to which the landlord is not at all a party. Under section 20(1) of the Tenancy Act the interest of a permanent tenure-holder or of a fixed-rate tenant is heritable according to

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his personal law; whereas other tenancies devolve according to the rule laid down in section 22. A dispute may very well arise between the rival heirs of a deceased tenant and the question of the true nature of the tenancy may have to be decided in a litigation to which the landlord is no party. Is it open to either set of these heirs to go behind the entry at the last revision of records and adduce evidence to the contrary? In my judgment the legislature intended that this should not be allowed. The presumption under section 9 is conclusive. The only way to displace it is by producing a judicial decision in proceedings instituted before the Act, and in no other way. From this it does not, however, follow that there is a conclusive presumption under the section for all time to come that the true nature of the lands is that of a fixed-rate tenancy. The presumption can only be that the lands were fixed-rate tenancies at the time when the entry was made. There is no presumption that the nature of those lands can never in future be altered.

There are many ways in which fixed-rate tenancies may come to an end, e.g., by surrender, ejectment, express agreement with the landlord, or, as in this case, by merger. I cannot therefore see how one can shut out evidence directed to show that a new position has arisen since the settlement. It has been suggested in argument that so long as the entries in the revenue papers remain uncorrected, the presumption continues. But how can a correction be ever made after the coming into force of the Act? Whenever the courts are moved for making the correction, the presumption, according to the appellants' contention, must stand in the way.

The Full Bench in the case of *Jai Nath Pathak* v. *Kalka Upadhya* (1) did not mean to lay down anything more than that "the entry mentioned in section 9 is conclusive proof only as to the nature of the tenancy," and not as to the title to it; or, to be more exact, as to whether the person recorded *was* a permanent tenure-holder or a fixed-rate tenant *or not*.

I must presume conclusively that in 1881 these plots were fixed-rate holdings, but I am of opinion that there is nothing in section 9 which precludes a court from going into the question whether the effect of subsequent events has or has not been to alter its nature. As I have already stated, the effect

(1) (1912) I. L. R., 34 All., 385.

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of the partition of 1896 was to bring about a complete merger by which the fixed-rate holdings were destroyed and absorbed into zamindari rights. After that the owners became full proprietors. This is the finding of the learned District Judge, which in my opinion is fatal to this appeal. The plaintiffs clearly had a right to pre-empt the sale, as the custom of pre-emption exists in the village, and the property sold was a proprietary interest in the *mahal*. I would, therefore, dismiss the appeal.

LINDSAY, J.: I agree that this appeal should be dismissed, but I wish to add a few words regarding the argument based upon section 9 of the Tenancy Act. In my opinion that section could not be used in the present case for the purpose of defeating the claim of the plaintiff pre-emptor. It seems to me that the scope of section 9 is strictly limited and that the rule laid down in that section can only be applied in litigation arising between a landlord and tenant when the matter in issue between the landlord and tenant is the nature of a tenancy.

The Tenancy Act only professes to regulate litigation regarding agricultural tenancies and, in that view, it seems to me we ought to limit the scope of a section such as section 9, and ought not to assume that it was the intention of the Legislature to lay down a rule which should be of universal application so as to govern the legal relations of persons who do not stand *inter se* as landlord and tenant.

The Full Bench case of this Court, *Jai Nath Pathak* v. *Kalka Upadhya* (1), seems to me to be the clearest possible authority for this view. That ruling, to my mind, lays down that section 9 can only be had recourse to in cases of dispute between a zamindar and his tenant as to the nature of the tenancy and the section was framed for the purpose of providing a rule of evidence which should govern the decision of such cases. It is clearly laid down in the ruling in question that the entry mentioned in section 9 is conclusive proof only as to the nature of the tenancy. In the present case no question as to the nature of tenancy arises between a landlord and his tenant. The plaintiff does not stand in the relation of landlord to the defendant appellant who is the purchaser of this property. I hold, therefore, that section 9 could not be applied to the facts of the present case in order to show that the plaintiff had no

(1) (1912) I. L. R., 34 All., 285.

right of pre-emption and that the property was still a fixed-rate tenancy and not the zamindari property of the person who sold it.

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BY THE COURT.—The order of the Court is that the appeal fails and is dismissed with costs.

Appeal dismissed.

REVISIONAL CRIMINAL.

Before Mr. Justice Walsh.

1923 *June, 27.*

EMPEROR *v.* DAIBARI SINGH.*

Criminal Procedure Code, section 110—Security for good behaviour—Use of extraneous information possessed by trial court.

Although information which the trying magistrate already possesses concerning a person who is the subject of proceedings under section 110 of the Code of Criminal Procedure cannot be used as if it were evidence in the case, yet such information is a form of check which the trial court may legitimately use in order to test the nature of the evidence with which it has to deal, and to negative, for example, a suggestion that the police investigation has been unfair. *Ashiq Ali v. Emperor* (1), distinguished.

THIS was a reference made by the Sessions Judge of Azamgarh in a case under section 110 of the Code of Criminal Procedure. The facts of the case sufficiently appear from the following order of reference :—

"The applicant Daibari Singh has made this application to revise the order of the learned District Magistrate, dated the 21st of March, 1923, confirming the order of the Sub-Divisional Magistrate of Mohammadabad binding him down to be of good behaviour by the order dated the 4th of February, 1923. It appears that the applicant was reported against by the station officer of Ginyakot as a bad character who was habitually given to theft, that he was the leader of a gang of house-breakers and was dangerous. The applicant was accordingly called upon to furnish security. It is argued that the applicant should not have been bound down. From a perusal of the judgment of the learned District Magistrate I find that he took three points into consideration in dismissing the appeal preferred to him. The first is that the evidence of good and bad character was fairly evenly balanced on both sides; the second is that the Sub-Divisional Magistrate made a private inquiry which in his opinion was proper and conclusive and the third is that the applicant has been a history-sheeter since 1906.

As regards the first point it is not necessary for me to enter into the evidence, for the learned District Magistrate himself admits that the evidence of good and bad character is fairly evenly balanced.

As laid down in *Emperor v. Jugnu Singh* (2) this circumstance should be a point in favour of the applicant.

It may be true that the Sub-Divisional Magistrate can obtain some information about the bad characters living in his sub-division, but the question is whether the knowledge derived from such private information is legal evidence. The applicant had no source of information about the men who were the private informers of the Sub-Divisional Magistrate and it would be illegal and positively dangerous if the Sub-Divisional Magistrate is permitted to base his judgment on such knowledge derived from private information. This has been laid down by the Hon'ble Mr. Justice Walsh in an unreported judgment on a reference from this court, No. 158 of 1923, dated the 2nd of May, 1923 (21 A. L. J., 513).

* Criminal Reference No. 342 of 1923.

(1) (1923) 21 A. L. J., 513.

(2) (1922) I. L. R., 45 All., 109.

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The third point dealt with by the learned District Magistrate is that the applicant has been [illegible] this point is that of the Sub-Inspector who [illegible] down agree [illegible] evidence of the Sub-Inspector was not the [illegible] [illegible] that [illegible] name in the [illegible] the man was [illegible] [illegible] the applicant had ever been charged [illegible] yet it is attempted to show him as a desperate character, a thief and a dangerous man.

It has not been shown that the applicant has to live on theft or other bad means of livelihood [illegible]

Under the circumstances I recommend that the order of the Sub-Divisional Magistrate [illegible] down the applicants and the order of the learned District Magistrate [illegible] be not made. The usual explanation if any is given [illegible] before the record is submitted to the Honble High Court."

Babu *Pari Lal Banerji*, for the applicant.

The Crown was not represented.

WALSH, J.:—On the whole I am unable to accept this recommendation. The matter has been very fully argued, and I agree that the Sessions Judge had ground for referring the matter, but the explanation of the District Magistrate* throws an entirely different light on at least two points, if not all of them. Further, the case is clearly a different one from that which has been referred to, decided by myself, namely the case of *Ashiq Ali* v. *Emperor* (1), and the report shows the danger of reporting cases which are really only decisions on particular findings.

Dealing first with the general observations contained in my previous judgment: Although it is clear from the report that I was prepared to interfere on the single ground that the Magistrate had made private inquiries, it is equally clear to myself from the language which I used, that although the report in the Allahabad Law Journal, as is so often the case, fails to state the facts and does not give the judgment of the Magistrate which I was considering, the Magistrate in that case had made inquiries about the particular individuals who were subsequently brought before him before the trial, and had allowed the actual information against such individuals to influence his decision. I agree with the general observations of the District Magistrate on this question of making inquiries, and, although it is dangerous at all times to generalize, and people are much too apt in this Court to seize upon the slightest

* This could not be found on the record in the High Court.—Ed.

(1) (1923) 21 A. L. J., 613.

dictum as laying down some new rule of law, I compare the use which a Magistrate is bound to make, if he is conscientious, of knowledge which is already in his possession when he hears a case, with the examination of the police diary in a criminal charge. That is to say, it is not in itself substantive evidence which may be used against the accused, but it is a form of check which the trial court may legitimately use in order to test the nature of the evidence with which it has to deal, and to negative, for example, a suggestion that the police investigation has been unfair. That is to say, a finding that "inquiries about the accused satisfy me that he is a *badmash*," would be objectionable, but "the result of my inquiries in the neighbourhood, so far as they appear in the case of this accused, tend to show that the case against him has not been got up without reason," would be quite legitimate.

As regards the first point dealt with by the learned Sessions Judge and the Magistrate, all that the Magistrate did in dismissing the appeal was to say that the evidence was fairly evenly balanced, which referred to quantum, and a perusal of the judgment of the Magistrate who tried the case shows that he believed the prosecution evidence, and that the prosecution evidence was in fact stronger than the defence, and was called from the district or rather the village of the accused. In the case which has been cited, the prosecution evidence was vague, hearsay and unsubstantial, and none of it came from the village of the accused.

Thirdly, I think the Sessions Judge has really misunderstood the point about the history-sheet. It was not a question of the man being a history-sheeter only. It was definitely proved that he had been under surveillance, and the observation of the District Magistrate that there had recently been a large reduction in the history-sheets and that in the last cold weather tour at least 60 were closed after consultation, and this one was not, is at any rate evidence that a new chapter in relation to this man's reputation opened at that time unfavourably for him. After all, the *badmashi* section is a section of reputation and not of actual crime, and that is one reason why it is so unpopular. I am not disposed to encourage these references or revision applications, because so long as cases proceed regularly and fairly, the Magistrate is the best tribunal, in fact the only tribunal, who can satisfactorily decide them. I therefore decline to interfere and direct that the record be returned to the Sessions Judge.

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ACTS—1859—XIII (WORKMAN'S BREACH OF CONTRACT ACT), SECTIONS 2 AND 4—*Breach of contract by workman—Proceedings against workman compromised and fresh contract entered into, but without fresh advance.*] *A*, having entered into an agreement with *B* under section 2 of the Workman's Breach of Contract Act, 1859, and received from *B* an advance of Rs. 500, broke his agreement. Proceedings were taken against *A* under the Act, but these ended in a compromise, and *A* executed a fresh agreement with *B* in consideration of the original advance.

Held that this second agreement was not unenforceable under the Act because of the fact that no fresh advance was made to *A* directly in connection with it.

Abdul Rashid Khan v. Nisar Muhammad Khan, I. L. R., 45 All. 691

ACTS—1850—XIII (WORKMAN'S BREACH OF CONTRACT ACT), SECTION 2B—*Frivolous or vexatious complaint—Compensation—Notice to show cause a condition precedent to the making of an order for compensation.*] Before an order for compensation in respect of a frivolous or vexatious complaint can be made under section 2B of Act No. XIII of 1859 as amended by Act No. XII of 1920, it is a condition precedent that notice should be issued to the person against whom the order is proposed to be made, to show cause against the order.

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ACTS—1860—XLV (INDIAN PENAL CODE), SECTIONS 34, 37, 302—*Murder—Several persons joining in beating another with lathis—Common liability of all.*] Where several persons join in beating another with *lathis*, and inflict such serious injuries on him that he dies shortly after the beating, all are guilty of the offence of murder without distinction. *Emperor* v. *Sipahi Singh*, I. L. R., 45 All., 130, followed; *Emperor* v. *Bhola Singh*, I. L. R., 29 All., 282, and *Dhian Singh* v. *King-Emperor*, 9 A. L. J., 180, overruled.

Emperor v. Umed, I. L. R., 45 All. 727

ACTS—1860—XLV (INDIAN PENAL CODE), SECTIONS 52, 93 AND 92 - " *Good faith* "—*Unlawful confinement Unnecessarily harsh treatment of a lunatic.*] One SN, a person of means and education, living in a large town where medical assistance was readily obtainable, had a brother who was subject to insanity of an intermittent

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kind. When the fits were upon him he was dangerous. He fell into such a fit about the end of March, 1922, and SN then proceeded to have him chained up with heavy chains, and kept him so until the 3rd of July, when the matter was brought to the notice of the District Judge, who ordered his protection. The lunatic was brought before the Judge in the same fetters in which he had been confined, and, being examined by two medical practitioners, was then found to be sane. A charge under section 344 of the Indian Penal Code was brought against SN and he was convicted.

Held that in the circumstances SN could not be held to have acted in good faith so as to be entitled to the benefit of sections 88 and 92 of the Indian Penal Code.

Emperor v. Shimbhu Narain, I. L. R., 43 All ... 436

Acts—1860—XLV (Indian Penal Code), section 96—Act No. I of 1872 (*Indian Evidence Act*), *section 105—General exceptions—Lunacy—Burden of proof.*] Although the law lays down that the court of trying criminal cases which give the benefit of a general exception to an accused person has to bear in mind in the absence of evidence the presumption is against the accused, this does not mean that the accused must lead evidence. If it is apparent from the evidence on the record, whether produced by the prosecution or by the defence, that a general exception would apply, then the presumption is removed and it is open to the Court to consider whether the evidence proves to its satisfaction that the accused comes within the exception.

Emperor v. Muhammad Ananda, I. L. R., 45 All. ... 899

Acts—1860—XLV (Indian Penal Code), section 97—*Joint Right of private defence—Right to take precautions against an anticipated attack.*] Certain persons who were lawfully in possession, as tenants, of agricultural land, having reason to suppose that it was possible that they might be attacked and ejected from the land by force, made a practice of keeping their lathis in an enclosure, and also persuaded the tenants of some adjacent fields to do likewise. The expected attack came, and there was a pitched affray, in the course of which both parties were injured.

Held that the defenders were within their rights in holding themselves in readiness to repel an attack if and when it should come, and were protected by section 97 of the Indian Penal Code. *Queen-Empress* v. *Narsang Pathabai*, I. L. R., 11 Bom., 441, *Regula Dheemappa* v. *Emperor*, I. L. R., 45 Mad., 249, *Queen-Empress* v. *Timmal*, I. L. R., 21 All., 192, and *Queen-Empress* v. *Pran Dai*, I. L. R., 20 All., 459, referred to.

Emperor v. Hira, I. L. R., 45 All. 250

Acts—1860—XLV (Indian Penal Code), sections 195, 211—*Complaint of offence requiring sanction dismissed for want of sanction—Complainant not allowed to prefer a second complaint in the same facts of an offence not requiring sanction—Practice.*] It is contrary to public policy and to the recognised principles of the administration of criminal law, when a charge has been launched which requires sanction by a particular authority and that authority has refused sanction, to hold that it is open to a complainant to alter his election, shift his ground and start a fresh charge on an alternative section which does not require sanction.

Emperor v. Kehna Ram, I. L. R., 45 All. 11

Acts—1860—XLV (Indian Penal Code), section 188, *See* Criminal Procedure Code, section 144 526

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ACTS—1860—XLV (INDIAN PENAL CODE), SECTIONS 215 AND 511—*Attempt—Proposal to procure restoration of stolen property upon payment of money and undertaking not to prosecute.*] S. had some of his buffaloes stolen. *H.* proposed to *S.* that if *S.* gave him Rs. 200 and promised to take no steps to prosecute the thieves he would procure the restoration of the stolen cattle. *S.*, however, would not agree to this proposal and reported the matter to the police.

Held that *H.* was rightly convicted of an attempt to commit the offence specified in section 215 of the Indian Penal Code. *Queen-Empress* v. *Chittar*, I. L. R., 20 All., 369, not followed.

Emperor v. Hargnyan, I. L. R., 46 All. 159

ACTS—1860—XLV (INDIAN PENAL CODE), SECTIONS 225B, 323 AND 352—*Arrest made* bonâ fide *but under warrant illegally issued—Rescue—Offence committed by rescuers.*] Two constables in the *bonâ fide* execution of their duty carried out an arrest under a warrant which, unknown to them, was in fact not legally issued. Whereupon certain persons came up and rescued the prisoner and tore up the warrant but did not cause hurt to any one.

Held that the rescuers were not liable to punishment under sections 225B or 323 of the Indian Penal Code, but should have been convicted under section 352.

Emperor v. Gokal, I. L. R., 45 All. 142

ACTS—1860—XLV (INDIAN PENAL CODE), SECTION 228—*Impertinent threat by accused to witness in box.*] An accused person who, during the hearing of a case, makes an impertinent threat to a witness in the box, commits an offence under section 228 of the Indian Penal Code.

Emperor v. Allu, I. L. R., 45 All. 272

ACTS—1860—XLV (INDIAN PENAL CODE), SECTION 297—*Act of sexual connection committed in a mosque.*] *Held* that persons having sexual connection inside a mosque are guilty of an offence under section 297 of the Indian Penal Code. *Queen-Empress* v. *Subhan*, I. L. R., 18 All., 305, *Emperor* v. *Ram Prasad*, I. L. R., 33 All., 773, and *In re Ratna Mudali*, I. L. R., 10 Mad., 126, referred to.

Emperor v. Maqsud Husain, I. L. R., 45 All. ... 520

ACTS—1860—XLV (INDIAN PENAL CODE), SECTIONS 299, 300—*Culpable homicide—Murder—Reckless administration of* dhatura.] A person who recklessly administers *dhatura* to another is guilty, if death ensue, of the offence of murder, and not merely of culpable homicide not amounting to murder or of grievous hurt. *Emperor* v. *Gutali*, I. L. R., 31 All., 148, and *Jeoli* v. *Emperor*, 15 A. L. J., 13, referred to.

Emperor v. Nanhu, I. L. R., 45 All. 557

ACTS—1860—XLV (INDIAN PENAL CODE), SECTION 302—*Culpable homicide—Murder—Concerted attack by men armed with* lathis.] Where a number of men armed with *lathis* make a concerted attack upon another man and practically killed him on the spot, inflicting injuries on the head, the result of blows which must have been struck either with the intention to kill, or at any rate, with the intention to cause hurt, such as the strikers must have known to be imminently likely to result in the death of the person struck, *held*, that the accused are guilty of murder. *Emperor* v. *Ram Newaz*, I. L. R., 35 All., 506, followed.

Emperor v. Sipahi Singh, I. L. R., 45 All. 130

ACTS—1860—XLV (INDIAN PENAL CODE), SECTION 379—*Theft. Water in possession of cantonment authorities—Surreptitious connection put from cantonment water pipe.*] Water when conveyed in pipes and so reduced into possession can be the subject of theft. *Ferens*

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v. O'Brien, I. L. R. 11, Cal., 448 ; Queen-Empress v. Jotee Pershad Mookerjee, M. W. N., 129, followed ; Empress v. Nobin Chunder Das, I. L. R., 25 Calc., 837, referred to.

Emperor v. Mahesh Pershad, I. L. R., 6 All. ... 680

ACTS 1860—XLV (INDIAN PENAL CODE), SECTIONS 403, 424 AND 477A.—*Extortion—Servant—Agent—Breach of trust by public servant or by agent—Criminal breach of trust by clerk or servant.*] A was employed by B as a clerk to collect rents and to manage his property. The position of A was that of a mukhtar to whom B had given a power-of-attorney. He continued to collect rents, which were the proceeds of the land, his employer was provided for by a certain allowance and a certain amount of business and ultimately paid the rent.

Held that the person who collected the rents, who had been convicted under sections 403 of the Indian Penal Code, was rightly convicted, and might very well have been convicted under section 424 of the Code.

Emperor v. Chaturbhuj, I. L. R., 45 All ... 137

ACTS 1860 XLV (INDIAN PENAL CODE), SECTION 412. *Receiving of stolen property knowing it to be stolen—Proof of receiving.*] A person found in possession of property recently stolen, which was identified by different owners, was tried for receiving the property of different owners, and for the theft of the property of one of the owners, under, there is evidence to prove that they were received by him at different times. *Queen-Empress* v. *Mahadeo*, I. L. R., 15 All., 217, followed.

Emperor v. Sheo Charan, I. L. R., 45 All 488

ACTS 1860 XLV (INDIAN PENAL CODE), SECTION 405. *Breach of trust by servant—Act (Lucknow Act II of 1903) of Local Power to Municipalities Act, sections 116, 200, 204—Sweepers appointed by a municipal board through "customary sweepers"—Refuse and night soil collected by the sweepers become the property of the board.*] Where a municipal board uses the services of sweepers through "customary sweepers," the night soil collected by the sweepers is the property of the board. Where a sanitary inspector, having entrusted the sweepers of one of the wards collected by them to a person other than one to whom by the board, the sweepers could not be convicted of criminal breach of trust, he was rightly convicted of criminal breach of trust.

Emperor v. Hira Lal, I. L. R., 45 All 202

ACTS 1860 XLV (INDIAN PENAL CODE), SECTION 405. *Criminal breach of trust—Buyer of an article on a hire purchase agreement—Property in article remains in seller before the instalment agreed upon is paid.*] One C agreed to purchase a motor lorry from the owners, paying the price by instalments. Meanwhile he signed an agreement with the owners by which, describing himself as "the hirer," he undertook, *inter alia*, to pay certain instalments; to insure the vehicle hired; not to deal with it; to allow the owners to recover possession in case of default in payment of instalments; and he admitted that the lorry would remain the property of the owners until all the instalments due were paid.

Held that C, having, in despite of his agreement, sold the lorry before the instalments were paid, was guilty of criminal breach of trust within the meaning of section 420 of the Indian Penal Code.

Emperor v. C. J. Cadd, I. L. R., 45 All. 593

ACTS—1860—XLV (INDIAN PENAL CODE), SECTION 447. *Criminal trespass—Offence attended by criminal force—Criminal Procedure Code, section 522.*] The owner of a field, finding some persons thereon ploughing up his autumn crop, endeavoured, by standing

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in front of the ploughs, to cause them to desist, but was driven off with sticks and *lathis*. The trespassers were convicted, and thereafter the owner of the field applied for an order under section 522 of the Code of Criminal Procedure restoring him to possession.

Held that the offence committed by the trespassers was one "attended by criminal force" and an order under section 522 was appropriate.

Emperor *v.* Ashiq Husain Khan, I. L. R., 45 All. ... 25

ACTS—1860—XLV (INDIAN PENAL CODE), SECTIONS 504, 323—*Compounding offences—Continuance of trial after composition of a compoundable offence.*] *J.*, a railway guard, abused and committed an assault of a more or less technical nature on *S. C.*, a passenger. *S. C.* made a complaint to the Police and a case was instituted under section 126 of the Railways Act. Meanwhile *J.* offered an apology to *S. C.*, who gave him the following document:—"This is to say that Mr. John, guard, B. N. W. Railway, came to me and offered an unconditional apology before Dr. L. N. Rai, Assistant Surgeon, Benares. I beg to withdraw the case against him." This was produced at the trial. The Magistrate acquitted *J.* of the charge under section 126 of the Railways Act, but convicted him under sections 504 and 323 of the Indian Penal Code.

Held that this document clearly amounted to a composition of the offence committed by *J.*, in so far as it was compoundable, and the Magistrate could not, therefore, charge and convict *J.* under sections 504 and 323 of the Indian Penal Code.

Emperor *v.* J. John, I. L. R., 45 All. 148

ACTS—1861—V (POLICE ACT), *section 4—Criminal Procedure Code, section* 195 (1)(*a*)—*Sanction to prosecute—Revision.*] For the purposes of section 195 (1)(*a*) of the Criminal Procedure Code, the Superintendent of Police of a district is subordinate to the District Magistrate, in accordance with section 4 of the Police Act, 1861. *Emperor v. Shib Singh*, I. L. R., 27 All., 202, followed. *Ramasory Lal v. Queen-Empress*, I. L. R., 27 Calc., 453, and *Emperor v. Sarada Prasad Chatterjee*, I. L. R., 33 Calc., 180, referred to.

Chhote Lal *v.* Chhedi Lal, I. L. R., 45 All. ... 135

ACTS—1867—III (PUBLIC GAMBLING ACT),—*Common gaming house—Presumption—Possible instruments of gaming found in the house, but not in use—Betting—"Commission."*] *Held* on application for revision of a conviction under the Public Gambling Act, 1867, (1) that the finding of cards, dice and cowries in a house, the same not being used for purposes of gambling, was not of itself sufficient to give rise to the presumption that the house was a common gaming house; and (2) that the taking by the owner of the house of a percentage on the winnings of persons who made bets with him amounted to nothing more than a discount on the odds which he laid, and did not come within the meaning of "commission," so as to make the transaction an offence under the Act.

Emperor *v.* Durga Prasad, I. L. R., 45 All. 258

ACTS—1867—III (PUBLIC GAMBLING ACT), SECTIONS 4, 5 AND 6—*Common gaming house—House searched under a warrant duly issued—Presumption.*] Where a house is searched on the authority of a warrant duly issued under section 5 of the Public Gambling Act, 1867, and gambling is found going on in the house and instruments of gaming are of a kind therein, the presumption pro

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voided by section 6 of the Act, applies and is not inconsistent with the necessity of direct evidence that the gambling was being carried on for the profit of the keeper of the house, and all persons found present are liable to conviction under section 1. *Empress* v. *Emperor*, 20 A. L. J., 273, distinguished.

Emperor v. Sita Ram, I. L. R., 45 All 671

Acts—1869, I (Oudh Estates Act), sections 22 and 23—*Sanad, Talugdari Estate—Construction of deed of settlement—"Heirs and representatives"—Hindu Law—Mitakshara—Father devising self-acquired property to son.*] The holder of an Oudh talluqa in list 2 under Act I of 1869 executed in 1871 a deed of settlement which provided that after the deaths of himself, and the son and widow of his eldest son (to each of whom a life interest was given), his second son *L*. and his heirs and representatives shall succeed to the entire estate as provided by s. 22 of Act I of 1869.

Held (1) that *L*. took an absolute interest in reversion. The words "heirs and representatives" were to be "a deed as words of limitation, not purchaser; and the words "as provided by s. 22 of Act I of 1869" could be rejected, rather as an attempt to delegate from the grant, or as words of description inappropriately used; thus avoiding a condition that was being an attempt to create a line of succession impossible under the rule in the *Tagore Case*, L. R., I. A., Supp., 47.

(2) That *L*. took the estate as self-acquired, not ancestral, property, and could dispose of it by will. Before the deed was executed the estate was held under the Act, and would have descended to a single heir thereunder and not according to the Mitakshara Law; it was therefore unnecessary to decide whether in the case of a devise to a son of self-acquired property, which otherwise would have descended according to the Mitakshara, the son taken the property as ancestral or self-acquired. The conflicting decisions of the High Court on that question were reviewed.

Judgment of the court of the Judicial Commissioner affirmed.

Lal Ram Singh v. Deputy Commissioner of Partabgarh, I. L. R., 45 All 526

Acts—1869—I (Oudh Estates Act), *See* Act No. IX of 1872, section 65 170

Acts—1870—VII (Court Fees Act), section 7(iv); schedule I, article 1—*Court fee—Cross-objections—Suit to set aside a sale-deed—"Legal necessity."*] One of the issues in a suit to cancel a sale-deed and obtain possession of the property was as to what extent the sale was supported by legal necessity and on appeal the lower appellate court found that as to part of the consideration, amounting to Rs. 100 as. 10, the sale had no legal necessity to support it; the suit, however, stood dismissed as far as the reliefs claimed were concerned. The plaintiffs having appealed from the decree so far as it was against them, the defendants filed cross-objections taking exception to the finding as to this item of Rs. 100 as. 10.

Held that an *ad valorem* court fee was payable in respect of the cross-objections. *Lakhan Singh* v. *Ram Kishan Das*, I. L. R., 40 All., 93 and *Dareqa Bant* v. *Musammat Parsoni Kuer*, 3 Pat. L. J., 197, referred to.

Ishdat Tiwari v. Tameshwar Tiwari, I. L. R., 45 All. ... 887

Acts—1870—VII (Court Fees Act), section 7(ix)—*Court fee—Suit for redemption of mortgage where surplus means profits are claimed—Jurisdiction—Valuation of suit.*] When a suit is brought for redemption and a certain amount is claimed as

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surplus mesne profits, the plaintiff is not bound to pay court fees upon the surplus amount claimed, in addition to the court fee on the principal amount secured by the mortgage. *Husaini Khanam* v. *Ilwain Khan*, I. L. R., 29 All., 471 (475), and *Gopi Kishan* v. *Sarabjee*, 6S Indian Cases, 226, followed.

Similarly, if the principal amount secured is within the jurisdiction of a munsif, that jurisdiction is not ousted if the plaintiff adds in his plaint a claim for surplus mesne profits which he estimates at a certain figure, thereby bringing the total to an amount beyond the jurisdiction. *Kedar Singh* v. *Matabadal Singh*, I. L. R., 31 All., 44, referred to.

Chhidda Singh *v.* Jhanjhan Rai, I. L. R., 45 All. ... 164

ACTS—1870—VII (COURT FEES ACT), SCHEDULE 1, ARTICLE 1—*Set-off—Amount claimed as set-off in excess of plaintiff's claim—Court fee—Order refusing time to plaintiff to make good deficiency—Revision.*] In reply to a suit for the recovery of money due on a mortgage, the defendant pleaded a set-off of an amount larger than that claimed and in effect asked for a decree against the plaintiff for the difference. He paid a court fee on the excess of his claim over the plaintiff's. The court, however, held that he was bound to pay court fees on the whole sum and not merely on the excess, and, refusing an adjournment to allow the defendant time to make good the deficiency, declined to go into the question of set-off.

Held that the order of the court below refusing to give the defendant time was not a fit subject for revision. *Buddhu Lal* v. *Meera Ram*, I. L. R., 43 All., 561, referred to.

Held also that the order requiring the defendant to pay a court fee on the full amount of the set-off claimed was a good order, regard being had to the first article of the first schedule to the Court Fees Act, 1870.

Chhakkan Lal *v.* Kanhaiya Lal, I. L. R., 45 All.... 218

ACTS—1872—I (INDIAN EVIDENCE ACT), SECTION 24—*Confession—"Inducement or promise"—Identification—Evidence led of identifications made by an accused person.*] A confession made by an accused person with the explanation added that he had been told by the *darogha* that he would be made an approver is not admissible in evidence against the person making it. Neither can secondary evidence be given of identifications made by an accused person who has not been made an approver.

The fact that a witness makes mistakes in identification is not a reason for discrediting his evidence in other matters.

Emperor *v.* Khetai, I. L. R., 45 All. 300

ACTS—1872—I (INDIAN EVIDENCE ACT), SECTION 24—*Confession—Accused induced to confess by prospect of obtaining a pardon—Criminal Procedure Code, section 164—Admissibility of evidence.* It is not legal to use, either as against the person making it or as against his co-accused, a confession which is the direct outcome of the confessing accused being given to understand that, if he confessed, there was a reasonable prospect of his receiving a pardon.

But where, after making such a confession, the accused makes a statement under section 364 of the Code of Criminal Procedure, in which, after stating that he has now no hope of obtaining a pardon, he affirms the confession previously made, such statement may be used, certainly as against the person making it, and possibly against his co-accused also. *Emperor* v. *Khetai*, I. L. R., 45 All., 300, referred to.

Emperor *v.* Tara, I. L. R., 45 All.

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ACTS—1872—I (INDIAN EVIDENCE ACT, SECTION 30—*Criminal Procedure Code, section 164 Confession—Statement of accused in answer to questions put by court—Use of statement against a co-accused.*] Where two persons are tried jointly, one of them pleading guilty, the other as the accused (a party to the trial) cannot avail himself of the case for the prosecution there is no evidence at all against the accused, it is not competent to the court to take into account against the accused a statement made by the latter in answer to questions put by the court and to convict him on the strength of it.

The expression "proving a confession" is inapplicable to the procedure where a plea of guilty is made and an accused person gives explanations under a special section provided for that purpose. *Queen Empress* v. *Nana*, I. L. R., 17 Bom., 634, and *Queen Empress* v. *Pitambar*, I. L. R., 18 All., 56, referred to. *Queen Empress* v. *Channa Patwala*, I. L. R., 25 Mad., 151, discussed from.

Emperor v. *Maqbul Hasan*, I. L. R., 45 All. ... 333

ACTS—1872—I (INDIAN EVIDENCE ACT, SECTION 92—*Partition—Terms of partition reduced to the form of a memorandum—Endorsement on memorandum—Oral evidence of terms of partition—Oral evidence admissible.*] Certain members of a joint family executed a memorandum which recited the terms of the partition between them and was signed by them. Later, on the deed was neither stamped nor registered, it was not received as evidence by the trial court.

Held that, although it might be open to the plaintiff to give oral evidence as to the mere fact that their had been a partition, he could not be allowed to go further and state what the terms of the partition were. *Chandabai Addiram Pranjivan* v. *Ton Mahadevar*, I. L. R., 41 Bom., 466, referred to.

Jai Ram Das v. *Raj Narain*, I. L. R., 45 All. ... 21

ACTS—1872—I (INDIAN EVIDENCE ACT), SECTION 108, *See* ACT NO. XLV OF 1860, SECTION 34 336

ACTS—1872—I (INDIAN EVIDENCE ACT, ... SECTION 108—*Presumption of death of person not heard of for seven years—Burden of proof.*] What the Court may presume under section 108 of the Indian Evidence Act, 1872, is confined to the fact only of death. It cannot presume that, because the person has not been heard of, he died at any particular moment, or in any particular way, or from any particular cause. *Muhammad Shafiq* v. *Bande Ali*, I. L. R., 34 All., 80, referred to.

In 1907 a Hindu aged 35, having been accused of embezzling money belonging to his employer, disappeared, leaving a childless wife. In 1916, the wife went through the form of adopting a son. The reversioner to her husband's property thereupon sued for a declaration that the adoption was void. That suit failed, because, although the court might be at liberty to presume (and did presume) that the husband was dead at the date of suit, it could not make the further presumption that he was dead at the date of the adoption.

In 1919 the wife made a further attempt to adopt, and on the strength of this adoption filed the present suit for partition of the family property. The court of first instance, considering itself bound by the finding in the earlier suit to hold that the husband had died before 1916, and therefore before the adoption, decreed the claim.

Held on appeal by the defendant that the finding in the former suit as to the date of the husband's death could not amount to a *res judicata*, and that the only presumption which might

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be made in the present suit was, again, that the husband was dead at the time of the filing of the suit.

Rokhab Das v. Musammat Sheobai, I. L. R., 45 All. ... 466

ACTS—1872—IX (INDIAN CONTRACT ACT), SECTION 11—*Sale by a debtor to a money-lender—Vendor found to be a minor—Equitable power of Court to make decree for restitution condition on repayment of consideration.* Notwithstanding that a contract of sale entered into by a minor may be destitute of legal effect, the court has an equitable power, wholly distinct from the existence of a contractual or non-contractual relation of the parties, which entitles it, in a case brought by the minor for cancellation of the sale-deed and restoration of the property, to make a decree conditional upon repayment of any consideration actually received by him. In each case the test must be the conduct of the parties.

Muhammad Said v. Bishambhar Nath, I. L. R., 45 All.... 644

ACTS—1872—IX (INDIAN CONTRACT ACT), SECTION 24—*Illegal contract—Money bond with a covenant for the mortgaging of the cultivatory holding of the borrower.*] Defendant borrowed money from plaintiff's father and executed a bond agreeing to repay it on a certain date. There was a further condition that if the money was not repaid on that date, the creditor could enter into possession of the defendant's cultivatory holding as a usufructuary mortgagee.

Held that the whole contract was not illegal and the plaintiff was entitled to a simple money decree, notwithstanding the invalidity of the condition. *Mohammad Shakur* v. *Gopi*, 32 Indian Cases, 202, referred to.

Jarbandhan v. Badri Narain, I. L. R., 45 All. ... 621

ACTS—1872—IX (INDIAN CONTRACT ACT), SECTION 30—*Wagering contract—Principal and agent—Right of agent to recover from his principal notwithstanding the nature of the contract.*] Section 30 of the Indian Contract Act, 1872, does not prevent a person who is employed as agent in connection with a wagering contract from recovering sums due to him by his principal. *Shibbo Mal* v. *Lachman Das*, I. L. R., 23 All., 165, and *Jagat Narain* v. *Sri Kishan Das*, I. L. R., 33 All., 219, referred to.

Bidhi Chand v. Kachhu Mal, I. L. R., 45 All. ... 503

ACTS—1872—IX (INDIAN CONTRACT ACT), SECTION 37, *See* Act No. IV of 1882, section 54 478

ACTS—1872—IX (INDIAN CONTRACT ACT), SECTION 65—*Agreement discovered to be void—Recovery of consideration—Unenforceable agreement—Sale of expectancy—Oudh talukdari estate—Decree declaring vendor heir—Act No. I of 1869 (Oudh Estates Act)—Limitation.*] A Hindu, while not reversioner to an Oudh estate (in list II under Act I of 1869), obtained a decree declaring that a will, which the widows of the last holder alleged authorized them to adopt, was invalid, and that he was entitled to the estate upon the death of the last surviving widow. Prior to that event occurring he purported to sell half the estate in consideration of Rs. 25,000 advanced to him, declaring by the sale-deed that when he succeeded he would put the vendee in proprietary possession. After the death of the last surviving widow, the widow of the purchaser sued the vendor for possession, or alternatively to recover the purchase money with interest.

Held that there was no effectual transfer of the villages, since the vendor had only an expectancy, and the decree did not create any greater interest in him; but that under section 65 of the

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Indian Contract Act, 1872, the purchaser may sue for damages, with interest, for the delay or the vendor, at the period of limitation not running until the facts of the purchaser were discovered to be misrepresentable.

Judgment of the Court below in both suits reversed.

Harnath Singh v. Sardar Ajaib Singh, I. L. R., 43 All. 179

Acts 1879 IX (Indian Contract Act), section 144; *Banker and Banker—Banker's Company—Delivery of goods to Banker's Company on the understanding to be a railway receipt for despatch and a forwarding note to be sent to the Bank's Calcutta Office*] Certain goods were delivered to a railway company for despatch and a forwarding note was sent to the plaintiff bank, who received a [illegible] from the railway company with tendered the forwarding note to become the next day for the receipt and have a number put on the said corresponding to the forwarding note. Meanwhile the goods were despatched on a railway bill, whereof it was [illegible] to have come to the plaintiff's possession, under the [illegible] Contract. A number of days elapsing (the number of the forwarding note was indicated on the goods, but not by any railway colour). It might be [illegible] from.

Held that the railway company were liable, as the goods had not been delivered to it within the meaning of section 144 of the Indian Contract Act, 1872.

Lachmi Narain v. Bombay, Baroda and Central India Railway Company, I. L. R., 38 All. 235

Acts 1870 X (Indian Penal Code), section 193; *Agreement to abide by oath of each party—Agreement to abide by decision of arbitrators and refer such decision—Whether party to such agreement] Where [illegible] agreement that the dispute should be decided by [illegible] oath and the other party [illegible] agreement, and [illegible] to the court to take the statement on oath the [illegible] and further evidence in the case, and, if the case [illegible], it was illegally and with material irregularity.

Mulla Dad v. Sardar Ali, I. L. R., 45 All. 734

Acts I of 1877 (Specific Relief Act), section 12 and 39; *Suit for specific performance—Decree—Suit for damages—Suit for recovery of earnest money—Civil Procedure Code, section 11, rule 2—Cause of action—Act IX of 1908 (Indian Limitation Act), schedule I, article 97—Limitation*] *Held* that a decree that a suit for specific performance of an agreement will be dismissed in so far as it is a subsequent suit for the recovery of earnest money paid in pursuance of such agreement: *Premchand Nowa v. Premchand Jaka Bhai Chatia*, I. L. R., 27 Mad., 240, referred to.

Held also that as regards the second suit limitation did not begin to run until the first suit had been decided: *Udit Narain Misra v. Muhammad Minnat-ullah*, I. L. R., 25 All., 610; *Amma Bibi v. Udit Narain Misra*, I. L. R., 30 All., 66, and *Hanuman Kamat v. Hanuman Mandur*, I. L. R., 19 Calc., 133, referred to.

Munni Babu v. Kunwar Kamta Singh, I. L. R., 35 All. ... 379

Acts—1877—I (Specific Relief Act), section 12; *Sale of joint family property by some members—Suit by other members for declaration of title—Possession not actually had.*] Certain members of a joint Hindu family sold some of the family property, and the vendee, in turn, gave a lease of the property to one of the vendors, with the result that the joint family continued in actual possession. The other members of the joint family sued for a declaration that the sale was void as against them.

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Held, on objection taken by the defendants based on section 42 of the Specific Relief Act, 1877, that, inasmuch as the plaintiffs had not actually lost possession of the disputed property, they were not obliged to seek more than a declaration. *Ram Manorath Singh* v. *Dirajo Kunwari*, I. L. R., 36 All., 126, followed.

Kanhai Lal v. Jai Lal, I. L. R., 45 All. 164

ACTS—1877—I (SPECIFIC RELIEF ACT), SECTION 42. *See* Act No. IX of 1908, schedule 1, articles 91, 118 and 120 169

ACTS—1879—XVIII (LEGAL PRACTITIONERS ACT), SECTION 36—*Touts—Order of District Judge including names in list of touts—Revision—Powers of superintendence of High Court—Government of India Act, section* 107.] Although the High Court has power, under section 107 of the Government of India Act, to call for and examine the record of any proceeding taken by a District Judge under section 36 of the Legal Practitioners Act, 1879, and thereafter to issue such orders or instructions as might appear to be proper, and would hold it a valid ground for interference if the District Judge had disobeyed any specific direction of the Act, as, for instance, had included the name of any person in the list of touts without allowing him an opportunity of showing cause against such inclusion, it would be straining the powers of interference conferred upon the Court and setting an undesirable precedent, if the Court were to take it upon itself in every case of the kind to consider whether the evidence relied upon by the District Judge in including an individual in the list of touts was or was not evidence from which the High Court itself would have drawn the same inference. *In the matter of the petition of Madho Ram*, I. L. R., 21 All., 181, approved.

In the matter of the petition of Kashi Nath, I. L. R., 45 All. 670

ACTS—1881—XII (N.-W. P., RENT ACT), SECTION 30, CLAUSE (d). *See* Act (Local) No. II of 1901, section 168 640

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 41—*"Ostensible owner"—Nature of facts warranting the application of section* 41.] On the death of his mother, some time in the early nineties, one Habib took possession of some immovable property belonging to her, to the exclusion of his sister, and had his name alone entered in the khewat. In 1896, Habib mortgaged the property, but afterwards redeemed it. In 1908, and again in 1911, Habib mortgaged the property afresh to the son of the former mortgagee. But it was not until the mortgagee had filed a suit on his mortgages and purchased the property in execution of the decree obtained thereon, that Habib's sister, although living in the same place, sued to set aside the mortgage and recover her share by inheritance.

Held that the facts of the case justified the application of section 41 of the Transfer of Property Act, 1882, and the plaintiff was not entitled to recover. *Jamna Das* v. *Uma Shankar*, I. L. R., 36 All., 308, and *Khwaja Muhammad Khan* v. *Muhammad Ibrahim*, I. L. R., 26 All., 490, referred to.

Mul Raj v. Fazal Imam, I. L. R., 45 All. 520

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 54—*Act No. IX of* 1872 *(Indian Contract Act), section* 37—*Sale—Covenant purporting to create a perpetual right of pre-emption in favour of vendor's heirs—Rule against perpetuities.*] *Held* that a covenant contained in a deed of sale of immovable property, which purported to impose upon the vendee and his representatives indefinitely an

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Acts [illegible] IV [illegible] ... *Execution of decree*—*Attachment*—*Private sale*—*Pre-emption*—*Pre-emptor's right not extinguished by sale of property sold*. A document which purported on the face of it to be a deed of sale of a share in a certain village ran as follows: "... If within six years, in the month of Jeth, I, the executant, pay the amount of sale-consideration, viz., Rs. 500, and the arrears of rent which may then be due against the property, the vendee shall not be entitled to ... [illegible] ... shall not be recovered." Further on it stated that the executant received the consideration for the sale "from the pre-emptor in cash money."

Held that the transaction was a mortgage by conditional sale and not an out and out sale, and the pre-emptor was entitled to share in the village and entitled to exercise the right of pre-emption which he had at such sale. *Chhatar Singh* v. *Hardeo Das*, I. L. R., 13 All., 505, referred to.

A pre-emptor is not debarred from suing in respect of any particular transaction of sale because his right does not extend to the whole of the property sold; but he must sue in respect of the whole [illegible] ... right of pre-emption subsists. *Dwarka Prasad* v. *Ganga*, I. L. R., 6 All., 196, and *Chaturbhuj Das* v. *Bakhtawar Singh*, I. L. R., 7 All., 147, referred to.

Nobendra Man Singh v. *Maharaj Singh*, I. L. R., 15 All. ... 52

Acts [illegible] IV [illegible] ... *Execution of decree*—*Mortgage created by mortgagee in possession in execution of pre-emption proceedings*—*Decree to execute conveyance*—*Improvidence of last mentioned*—*Suit by plaintiffs mortgagors for redemption of other land*. In the course of certain pre-emption proceedings for the execution of a certain money decree, the parties came to a compromise which was recorded in Court. The sum due by the defendants was declared to be a first charge on land, the defendants handed over certain plots of land to the plaintiffs, one-fourth of which was to be taken in account, and the defendants were given the right to redeem [illegible] ... of the land. It was further provided that if the plaintiffs were in any way dispossessed they should then proceed with the execution of their decree. The plaintiffs were dispossessed by [illegible] ... years, when the whole of the mortgaged land was sold under the decree. The plaintiffs then sued under section 6 of the Transfer of Property Act, 1882, asking to be given back land in place of that which had disappeared, also for other items by way of damages and Government revenue which they had been obliged to pay.

Held that the mortgage constituted by the compromise was a good mortgage, and, as it was not open to the plaintiffs to execute the original decree, they were perfectly within their rights in bringing a suit under section 6 of the Transfer of Property Act, 1882. *Abid Husain* v. *Asghar Husain*, 11 A. L. J., 536, and *Salamat*-

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uz-Zamin Begam v. *Masha Allah Khan*, I. L. R., 40 All., 187, referred to.

Ram Sewak Rai v. Sheo Naik Rai, I. L. R., 45 All. ... 388

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTIONS 83, 84 AND 103—*Mortgage—Deposit of mortgage money—Procedure necessary when mortgagee is a minor.*] *Held*, on a construction of sections 83 and 84 of the Transfer of Property Act, 1882, that it is the duty of a mortgagor, in cases where he is dealing with a minor mortgagee, to take all steps which are necessary to procure the appointment of a guardian *ad litem*. In a case like this the mortgagor must apply to the court and must bring before the court some person who is willing to act as guardian, or, failing that, he must satisfy the court, in whatever way he can, that there is no person to his knowledge who is willing to accept the duties of a guardian. In that case he can ask the court to take action under order XXXII, rule 4, of the Code of Civil Procedure. *Pandurang Babu Parab* v. *Mahadaji Moreshwar Gokhale*, I. L. R., 27 Bom., 23, referred to.

Kanhu Mal v. Indarpal Singh, I. L. R., 45 All. ... 273

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 83—*Mortgage—Deposit of mortgage money by mortgagor—Refusal of mortgagee to accept deposit.*] A deposit made by a mortgagor under the provisions of section 83 of the Transfer of Property Act, 1882, does not have any effect on the relations between the mortgagor and the mortgagee unless and until such deposit is accepted by the mortgagee. If the deposit is refused and the mortgagor is dissatisfied with the action of the mortgagee in refusing the deposit, it is for him to bring a suit for the enforcement of his legal rights, and unless he does so successfully, the mortgage subsists.

Ahamad-ullah v. Abdul Rahim, I. L. R., 45 All. ... 592

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 89—*Mortgage—Effect of a decree absolute under the Transfer of Property Act—Prior and subsequent mortgagees.*] Inasmuch as a final decree under section 89 of the Transfer of Property Act, 1882, had the effect of extinguishing both the security and the right of redemption, a subsequent mortgagee who has satisfied such a decree cannot claim priority over an intermediate mortgagee, in virtue of the mortgage upon which such decree was based. *Chhajan Lal* v. *Muhammad Husain Khan*, I. L. R., 41 All., 456, followed. *Sukhi* v. *Ghulam Safdar Khan*, I. L. R., 43 All., 463, distinguished.

Jugannath Prasad v. Chhatur Kunwar, I. L. R., 45 All. 149

ACTS—1882—IV (TRANSFER OF PROPERTY ACT), SECTION 123—*Gift—Hindu law—Delivery of possession—Gift made by a Hindu reserving a life interest to the donor.*] A Hindu lady, who is the full proprietor of immovable property, can by a registered document, duly signed and attested, validly make an immediate gift of it, although she reserves to herself the enjoyment of the usufruct or profits of a part of the property for her life time and without retaining any power of alienation over it.

Held, also, on a construction of section 123 of the Transfer of Property Act, 1882, that, even if delivery of possession was essential to the validity of a gift made by a Hindu prior to the passing of that Act, it is now no longer necessary. *Dharmodas Das* v. *Nistarini Dasi*, I. L. R., 14 Calc., 446, *Bulkishen* v. *Bhawani*, I. L. R., 34 Calc. 853, *Akbri Bewa* v. *Musa Koya*, I. L. R., 24 Mad., 513, *Madhavrao Moreshvar Pant Amatya* v. *Kashibai Kom Dattatraya*, I. L. R., 34 Bom., 287, *Man Bhari* v

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Narendra, I. L. R., 4 All., 85; Subramania Aiyar v. Thirumala Rau, I. L. R., 10 All., [illegible] I. L. R., 28 All., [illegible]

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Act [illegible] IX (Provincial Small Cause Courts Act), sections 17, [illegible] Held [illegible] Act did not [illegible] ... 334

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Notice [illegible] Indian Railways Act, 1890, [illegible] Indian Railways, Company, [illegible] Peninsular Railway Company, [illegible] I. L. R., 23 All., 514, followed

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ACTS—1894—I (LAND ACQUISITION ACT), SECTION 6—*Notification that land is required for a public purpose—Jurisdiction of Court to inquire whether the purpose is a "public purpose" excluded.*] Where a declaration has been issued under section 6 of the Land Acquisition Act, 1894, stating that certain land is required for a "public purpose," a court is debarred from inquiring into the question whether the purpose for which the land, in respect of which such a declaration has been issued, is required is a public purpose or not. *Trustees for the Improvement of Calcutta* v. *Chandra Kanta Ghosh*, I. L. R., 17 Calc., 500 and *Manick Chand Mahata* v. *The Corporation of Calcutta*, I. L. R., 48 Calc., 916, distinguished.

Secretary of State for India in Council v. Akbar Ali, I. L. R., 45 All. 443

ACTS—1897—IX (PROVIDENT FUNDS ACT), SECTION 2(4), *See* Civil Procedure Code, section 60, clause (1) (k) 554

ACTS—1899—II (INDIAN STAMP ACT), SECTION 35 (1); SCHEDULE I, ARTICLE 1—*Document requiring to be stamped—Record of account between creditor and debtor kept for the purpose of affording evidence of the indebtedness of the latter.*] The plaintiff sought to prove a debt due to him by the defendants by production of a statement of account recorded in the form of a letter in a book kept by him and signed by one of the defendants. The book appeared to be maintained by the plaintiff for the purpose of supplying evidence of the state of account between himself and his customers.

Held the entry or letter could not be put in evidence unless it was stamped. *Gobinton* v. *Hateliam*, I. L. R., 33 Calc., 749, referred to.

Ram Das v. Inayat ullah, I. L. R., 45 All. ... 374

ACTS—1908—IX (INDIAN LIMITATION ACT), SECTIONS 5 AND 14, *See* Act No. IX of 1887, section 17 332

ACTS—1908—IX (INDIAN LIMITATION ACT), SECTION 13—*Limitation—Territory under the administration of the Government of India—Place merely under Military occupation by an army sent from India.*] A place outside British India which is merely in military occupation by an army despatched by the Government of India is not "territory outside British India under the administration of the Government of India" within the meaning of section 13 of the Indian Limitation Act, 1908.

Fakhr-ullah Khan v. Ram Sarup, I. L. R., 45 All ... 18

ACTS—1908—IX (INDIAN LIMITATION ACT), SECTION 18—*Execution of decree—Irregularities in sale kept from knowledge of the judgment-debtor by fraud of the decree-holder—Sale confirmed—Application by judgment-debtor to set aside sale—Limitation.*] Under section 18 of the Indian Limitation Act, where irregularities affecting the validity of a sale in execution have, by the fraud of the judgment-creditor or other parties to the sale, been kept concealed from the judgment debtor, he is entitled, whether the sale has been confirmed or not, to make, as against the person guilty of the fraud or accessory thereto, such application, if any, as he may be entitled to make, his time for making it being computed from the time when the fraud first became known to him. The confirmation of the sale ought not to be used as a shield for the fraud by which the court was induced to make the sale itself. *Mohendro Narain Chatterji* v. *Gopal Mondul*, I. L. R., 17 Calc., 769, followed. *Gobind Chunder Majumdar* v. *Umi Chunia Sen*, I. L. R., 14 Calc., 679, dissented from.

Shiu Ram Kaeri v. Ikram-un-nissa Bibi, I. L. R., 45 All. 316

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Act (1908) IX [illegible]

Held [illegible]

Jugal Kishore [illegible] I. L. R., 45 All. ... [illegible]

Act (1908) IX (Indian Limitation Act), [illegible] article 47 [illegible] of the Code of Criminal Procedure [illegible] March, 1914, [illegible] 1919 [illegible] September, 1919 [illegible] 9th of March, 1920, [illegible] of their title in respect of the [illegible] and for an injunction.

Held that article 47 of the first schedule to the Indian Limitation Act, 1908, applied and the suit was barred by limitation.

Ram Sahai *v.* Bande Bihari Ghosh, I. L. R., 45 All. ... 306

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ACTS—1908—IX (INDIAN LIMITATION ACT), SCHEDULE I, ARTICLES 80, 116 AND 132—*Mortgage—Term twelve years, but option given to mortgagee of suing for the whole amount due on default of payment of interest—Suit to recover mortgage money—Limitation—*Terminus a quo.] A mortgage deed dated the 16th of November, 1905, contained the following covenant for interest and repayment of the mortgage debt:—"I hereby covenant and give in writing that I shall pay the money aforesaid with interest at the rate of 8 annas per cent. per mensem within a period of twelve years and shall pay interest from year to year. In case of non-payment of interest from year to year, the creditor has the option to add the interest to the principal, and to charge interest thereon at the aforesaid rate, or to recover through the court principal and interest from me and the hypothecated property and also from my other movable and immovable property and from my person within the stipulated period. The period fixed shall not bar the claim. In case of non-payment within the stipulated period, the creditor shall have the power to recover the money, principal and interest, together with compound interest, from me, the mortgaged property, or other movable or immovable property of mine. If I am not able to pay the money within the stipulated period, and with the consent of the creditor the money remains unpaid, the interest and compound interest at the aforesaid rate shall continue to run at the stipulated rate until the date of realization." Nothing at all was paid, and on the 6th of November, 1919, the mortgagee filed a suit for sale.

Held that limitation began to run against the mortgagee from the date of the first default in payment of interest and the suit for sale was therefore time-barred. It made no difference whether the right to sue for repayment before the stipulated period was optional or compulsory.

Gaya Din v. *Jhummun Lal*, I. L. R., 37 All., 400, *Pancham* v. *Ansar Husain*, I. L. R., 43 All., 695, *Nathi* v. *Turai*, I. L. R., 43 All., 671, and *Ram Das* v. *Muhammad Sabi*, 20 A. L. J., 340, followed. *Mata Pakal* v. *Bhagwan Singh*, 19 A. L. J., 406, *Girdhari Lal* v. *Gobind Ram*, 19 A. L. J., 455, *Gaya Prasad* v. *Sher Ali*, 16 A. L. J., 313, *Makrand Singh* v. *Kallu Singh*, I. L. R., 41 All., 581, and *Sham Lal* v. *Tehariya Lakhmi Chand*, 18 A. L. J., 476, overruled. *Husain Ali Khan* v. *Hafiz Ali Khan*, I. L. R., 8 All., 600, distinguished.

Held further, that a suit for a simple money decree was likewise barred by virtue of article 80, read with article 116 of the first schedule to the Indian Limitation Act, 1908. *Ball* v. *Stowell*, I. L. R., 2 All., 322, and *Har Narain* v. *Beni Pershad*, 8 Oudh Cases, 77, referred to.

Shib Dayal v. Meharban, I. L. R., 45 All 27

ACTS—1908—IX (INDIAN LIMITATION ACT), SCHEDULE I, ARTICLES 91, 118 AND 120—*Suit to declare adoption void—Limitation—Act No. I of 1877 (Specific Relief Act), section 42—Estoppel.*] On the 22nd of February, 1902, who was indebted to *B.* to the extent of Rs. 5,500, executed in favour of *C.*, a relation of *B.*, a mortgage of his property in village *K.* for the sum of Rs. 7,000, of which Rs. 5,500 were to be paid in satisfaction of *B.'s* claim.

On the 25th of September, 1902, *B.* executed a document in which he declared that he had adopted *D.*, one of the two sons of *B.*, and conveyed to him his property in village *K.* Mutation of names was effected in favour of *D.*, but *B.* remained in possession as *D.'s* guardian during his minority.

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Act, ... pay to B ... 1

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... village K. 1

... village K. 1

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Act ... See Act No. ... 1

Act ... *Family settlement* ... possession.] Under ... arrived at by means ... the shares allotted ... power of adoption, ... Within twelve years ... for recovery of ... adopted by the ... to have the alleged adoption ... to the suit and the finding ... against it.

Held that the suit ... of the provisions of the Indian Limitation Act, 1908, nor was there any foundation for a plea of adverse possession on the part of the original plaintiff of the property claimed. *Parbati* ... referred to: *Channi Lal* ... distinguished.

Radha Dubaya ... Radhik Lal, I. L. R., 45 All ... 1

Act ... *Suit for declaration of title to land* ... *possession.* ... *Alluvion.*] Defendants ... pur on the banks of the Ganges. The plaintiffs were occupiers of a contiguous village—Arazi Dayara Bhanpur. Adjacent to this latter village some land emerged from the river and was settled with the defendants in 1934. Shortly afterwards the land was submerged, but reappeared in 1871 and was again settled with the defendants, and it continued to be settled with the defendants

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until 1920, in spite of various attempts made by the plaintiffs in the revenue and criminal courts to get possession of it. In 1904 the plaintiffs instituted a regular suit in the civil court for a declaration of their title to the land, but subsequently withdrew it. In 1919 the present suit, in which also only a declaratory decree was asked for, was instituted.

Held that the suit was not maintainable. The land claimed was not a "gradual accretion" to the plaintiffs' village, and the plaintiffs were not shown ever to have held possession of it. And even if they had any right at any time, they had lost it by reason of their not having brought any suit for a declaration of their right within six years prior to the institution of the present suit. *Partab Bahadur Singh* v. *Gajadhar Pakhsh Singh*, I. L. R., 24 All., 521, and *Khaka Bakhsh* v. *Alim-un-nissa*, I. L. R., 27 All., 313, referred to.

Bijai Shankar v. Ram Charitra Singh, I. L. R., 45 All.... 461

ACTS—1908. XVI (INDIAN REGISTRATION ACT), SECTION 17. *See* Parties 226

ACTS—1920.—V (PROVINCIAL INSOLVENCY ACT), SECTION 60, SUB-SECTION (2)—*Civil Procedure Code, section 60—Insolvent—Proportion of salary of insolvent divisible amongst creditors—Allowance for support of insolvent and his family.*] The combined operation of section 2(5) of the Provincial Insolvency Act, 1920, and section 60(1) (iii) of the Code of Civil Procedure is, in the case of an insolvent whose income consist of a salary, to make only half of his salary divisible amongst his creditors. But this does not mean that all of that half *must* be divided amongst the creditors. Section 66 (2) of the Provincial Insolvency Act provides that the court may from time to time make such allowance as it may think just for the support of the insolvent and his family, and in fixing such allowance the court is not limited to the one half of the insolvent's salary which is exempted by section 60 of the Code of Civil Procedure. *Debi Prasad* v. *Lewis*, I. L. R., 40 All., 213, not followed.

Radha Mohan v. White, I. L. R., 45 All. 764

ACTS (LOCAL)—1901—II (AGRA TENANCY ACT), SECTION 9—*Pre-emption—Fixed-rate tenancy—Suit for pre-emption of land once a fixed-rate tenancy, but subsequently converted into zamindari—Presumption—Applicability of section 9 to a suit not between a landlord and tenant.*] The subject of a suit for pre-emption consisted of certain plots of land which at the settlement had been held, and recorded, as fixed-rate tenancies, but thereafter, by reason of partition proceedings, had fallen into the proprietary mahal of the fixed-rate tenants themselves.

Held that the legal consequence of the partition was to bring about a merger, a complete absorption of the fixed-rate tenancies into zamindari property, which could therefore be the subject of pre-emption.

Held, further, that section 9 of the Agra Tenancy Act, 1901, would not have the effect of rendering the suit unmaintainable. That section provides that the entry therein referred to shall be conclusive proof that a certain person was at the time the entry was made a fixed-rate tenant of certain land, but there is no presumption that the character of the land in question may not subsequently have been altered and evidence of such alteration may be adduced. *Jai Nath Pathak* v. *Kalka Upadhya*, I. L. R., 34 All., 265, referred to.

Shiv Narain v. Bajrangbali Misra, I. L. R., 45 All. ... 744

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Acts (Local—Bihar)—II (Agra Tenancy Act, section 167, sub-section IV, sched. No. 6—*Suit for damages for wrongful distraint—Limitation—Premium a question of fact, IX of 1871, Indian Limitation Act), section 23.*] The plaintiffs came into court asking for damages because, as they alleged, certain attachments of standing crops belonging to them had been wrongfully effected by the defendants on the 15th of May, 1919, and had not been released until the 15th of September. Meanwhile, owing to the attachments, the crops had become associated with other crops on the land. The suit was instituted on the 12th of December of the same year.

Held that, although the plaintiffs' pleadings were faulty, the suit was in substance a suit under clause (1), rather than under clause (2), of section 146 of the Agra Tenancy Act, 1901, and section 23 of the Limitation Act applied to it; and the cause of action, in effect, took its origin from the day on which the distraint came to an end. *Bumbar Singh* v. *Balwant Singh*, 8 A. L. J., 503, and *Dalip Upadhia* v. *Baurilal Upadhia*, 2 Legal Remembrancer (R. and R. Series), 61, referred to.

Jhabbo v. Mussumaut Batul, I. L. R., 42 All. ... 20

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ACTS (LOCAL)—1901—II (AGRA TENANCY ACT), SECTIONS 150, 154, 168 AND 177(c)—*Suit for resumption of muafi—Question of proprietary title raised in trial court—Appeal.*] If in a suit for resumption of *muafi* the defendant sets up a plea based on section 168 of the Agra Tenancy Act, 1901, he is raising a question of proprietary title, for obviously if the plea is determined in his favour, he is entitled to a declaration of his proprietary right. *Sundar Singh* v. *The Collector of Shahjahanpur*, I. L. R., 33 All., 503, referred to.

Lalta Prasad v. Kharga, I. L. R., 45 All. 936

ACTS (LOCAL)—1901—II (AGRA TENANCY ACT), SECTION 168—*Act No. XII of 1881 (N.-W. P. Rent Act) section 30 clause (d)—"Land"—Grove-land—Acquisition of proprietary rights.*] Plaintiffs sued under section 168 of the Tenancy Act for a declaration that they had acquired under-proprietary rights in certain land. The land had been granted rent-free about one hundred years previously to their predecessor in title to be used either for cultivation or for planting a grove, and the grantee had in fact planted a grove.

Held that section 168 of the Tenancy Act did not apply as an area occupied by a grove was not "land" within the meaning of that Act, and that in order to get the benefit of section 30, clause (*d*) of Act No. XII of 1881, the plaintiffs were bound to show that the land had been held rent-free, and by at least two successors to the original grantee, for fifty years prior to the 22nd of December, 1873.

Keshe Das v. Hanuman Pande, I. L. R., 45 All. ... 640

ACTS—(LOCAL) 1901—II (AGRA TENANCY ACT), SECTION 177—*Order returning memorandum of appeal—High Court's powers of revision.*] *Held* that the High Court has no jurisdiction to interfere in revision with the order of a District Judge returning a memorandum of appeal for presentation to the proper court upon the ground that the appeal did not lie to him under the provisions of section 177 of the Agra Tenancy Act, 1901. *Gaj Kumar Chandar* v. *Salamat Ali*, I. L. R., 42 All., 83, followed. *Parbhu Narain Singh* v. *Harbans Lal*, 14 A. L. J., 281, *Jumna Prasad* v. *Karan Singh*, I. L. R., 41 All., 28 and *Keshe Das* v. *Murat*, 12 A. L. J., 367, referred to.

Adya Saran v. Kali Charan, I. L. R., 46 All. ... 567

ACTS (LOCAL)—1901—III (UNITED PROVINCES LAND REVENUE ACT), SECTION 107—*Partition—Right of daughter holding a life interest under her father's will and recorded as a co-sharer.*] A separated Hindu bequeathed a share in a village to his daughter, who was a childless widow, for her life time, with a reversion in favour of certain male members of the family, and the devisee in due course obtained possession and mutation of names in her favour.

Held that she was entitled, subject to any of the usual objections of a general nature, to claim a partition of the share bequeathed to her. *Bhoop Singh* v. *Musammat Phool Kower*, N.-W. P., H. C. Rep., 1867, p. 368, *Jhumna Kuar* v. *Chain Sukh*, I. L. R., 3 All., 400, *Habibulla* v. *Kushiabat*, 3 A. L. J., 491, *Mahadeo Singh* v. *Musammat Dee Kuer*, 9 Oudh Cases, 53, *Sundar* v. *Parbati*, I. L. R., 32 All., 51, *Hari Narayan Jog* v. *Vitai*, I. L. R., 31 Bom., 550, and *Durga Dat* v. *Gita*, I. L. R., 35 All., 147, referred to.

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Act (Bombay) 1878 (IV of 1878), ss. 49, 50, 51 and 52—*Principal and agent—Power of agent to bind principal—Agent for the purposes of a particular transaction—Implied authority—Agent.*] A man is not ordinarily liable for the criminal acts of his agent, except in those cases where, being authorized to carry on the business of a licensed dealer in spirituous liquors, he is guilty of a breach of the restrictions. If more were relevant it must be such as that the principal had knowledge. But there may be, and there is in criminal dealings, persons other than that which may be called strict legal governors, for the purposes of a particular statute. Control or dominion over material [illegible] although actual legal possession, [illegible] may be in another.

Emperor v. *Gajadhar*, I. L. R., 27 All., 263 and *Emperor* v. *Ghulam Hussain*, I. L. R., 30 All., 456, referred to.

Emperor v. Zawar Hussain, I. L. R., 45 All. ... 641

Acts (Local)—1911—IV (Ostensible Partners—Excise Acts, ss. 21 (c)—*Wilful sale of liquor by one partner in contravention of terms of licence—Liability of other partner.*] Where one of two partners in a licence for the sale of liquor wilfully commits a breach of the

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conditions of the licence, the other partner is equally liable to the penal provisions of the United Provinces Excise Act, 1910. *Queen-Empress* v. *Tyau Ala*, I. L. R., 21 Bom., 123, and *Emperor* v. *Fateh Lal*, I. L. R., 34 All., 539, referred to.

Emperor *v.* Jwala Prasad, I. L. R., 45 All. 642

ACTS (LOCAL)—1916—II (UNITED PROVINCES MUNICIPALITIES ACT), section 16(3)(c)—*" Place of profit "—Holder of a contract with Municipal Board—Eligibility for election as a member of the Board.*] A person who holds a contract for the supply of some article of merchandize to a Municipal Board cannot be said to hold a " place of profit in the gift or disposal of the Municipal Board " within the meaning of section 16(3)(c) of the United Provinces Municipalities Act, 1916. Such a person, therefore, is not disqualified from being elected to and sitting as a member of the Board from which he holds the contract.

Muhammad Bakhsh *v.* Muhammad Abdul Baqi Khan, I. L. R., 45 All. 720

ACTS (LOCAL)—1916—II (UNITED PROVINCES MUNICIPALITIES ACT), SECTIONS 19, 20 AND 22—*Election petition.—Presentation—Verification—Who may prefer an election petition.*] *Held* that, where there was evidence of a practice in a particular district whereby petitions intended for the Collector were commonly presented to the Joint Magistrate of the Collector was not in court at the time, and were made over by the Joint Magistrate to the Collector on his arrival, an election petition under section 19 of the United Provinces Municipalities Act, 1916, which was presented to the Joint Magistrate and in fact reached the Collector before the period of limitation had expired was properly presented.

Held also, that a person who, being about to offer himself as a candidate for a municipal election, was induced by the local leaders to withdraw, had no *locus standi* to petition against the election of the successful candidate.

Held further that an election petition under the United Provinces Municipalities Act, 1916, need not be verified in the manner prescribed by the Code of Civil Procedure for the verification of plaints.

Suraj Narain *v.* Jang Bahadur, I. L. R., 45 All. ... 687

ACTS (LOCAL) 1912—IV (UNITED PROVINCES COURT OF WARDS ACT), SECTION 54—*Suit against wards—Notice given by predecessor in title of plaintiff not effective.*] *Held* that a notice given by the immediate predecessor in title of a plaintiff of his intention to sue the Court of Wards for the recovery of property in which certain wards were interested would not enure for the benefit of the plaintiff himself when the property was transferred to him. *Bachchu Singh* v. *The Secretary of State for India in Council*, I. L. R., 25 All., 187, followed.

Muhammad Siddiq Ali Khan *v.* Anwar-ul-Hasan, I. L. R., 45 All.... 663

ACTS (LOCAL)—1916 II (UNITED PROVINCES MUNICIPALITIES ACT), SECTIONS 116, 200, 273, 274. See Act No. XIV of 1860, section 420 982

ACTS (LOCAL)—1916—II (UNITED PROVINCES MUNICIPALITIES ACT), SECTION 326—*Lease of right to collect carcases of dead animals within municipal limits—Right conferred not one relating to immovable property Suit to declare lease invalid—Limitation.*] The Municipal Board of Dhampur gave a lease to B of the right to collect the carcases of dead animals within municipal limits. More than six months after this lease had been granted, plaintiffs

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Kalia [illegible] v. Rajendra Prasad, I. L. R., 45 All. ... 75

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Where [illegible] the appeal [illegible] default [illegible] I. L. R., [illegible] followed.

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ARBITRATION—*Award—Apparent discrepancy between terms of award and map filed therewith—Means of correcting discrepancy—Execution of decree.*] If there is on the face of an award a patent inconsistency, such as a flat contradiction in measurement, or a mistake of arithmetical calculation, it is open to the court to which application is made for filing the award, or a patent error of that sort being pointed out, to send the award back to the arbitrators to correct it, before a decree is passed in accordance with it. But anything of this kind cannot be done in execution proceedings.

Har Prasad *v.* Raghubar Dayal, I. L. R., 45 All. ... 623

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BIRE LAMANI—*Offerings made to* pragwals *by pilgrims—Partition—Method of effecting partition.*] In a case where partition of a *bari pajmani*, consisting of offerings given to a *pragwal* by pilgrims who came to bathe in the Ganges, was sought, it was *held* that the division should be carried out—not by allotting clients to one party or the other but by division of the *pothis*, or books in which the names of the clients were entered. In the case of necessaries, such as the flag, etc., which were not capable of division, it would be open to the officer making the partition to allow each party to use a similar flag. *Beni Madho Pragwal* v. *Hira Lal*, I. L. R., 43 All., 29, *Lakhai* v. *Salli*, I. L. R., 43 All., 35, and *Narayan Lal Gupta* v. *Chalhan Lal Gupta*, 15 C. L. J., 376, referred to.

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Civil Procedure Code, section 92 "Public nuisance" "suit for removal of an encroachment" [illegible] ment as trustees and the persons in charge of the deity.] Held that section 92 of the Code of Civil Procedure would not apply to a suit where the plaintiffs claimed possession of an

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imambara upon the allegation that they had been legally appointed trustees of the *imambara* and that the defendants—the former trustees—had been legally dismissed and were thereafterward merely in the position of trespassers. *Muhammad Abdul Majid* v. *Ahmad Said Khan*, I. L. R., 35 All., 459 and *Agatun-ussa Bibi* v. *Kulfu Khalifa*, I. L. R., 41 Calc., 749, followed; but the former case doubted by WALSH, J.

Inayat Hussain v. Faiz Muhammad, I. L. R., 45 All. ... 205

CIVIL PROCEDURE CODE, SECTION 92. *See* Libel 215

CIVIL PROCEDURE CODE, SECTION 99; ORDER III, RULES 1 AND 2; ORDER IV, RULE 1.—*Plaint—Plaint presented by an alleged minor acting through a next friend, plaintiff being in fact of full age—plaint invalid.*] Where a person who was in fact of full age presented to a court a plaint which purported to be a plaint in a suit by a minor and was tendered to the court by a vakil on the authority of a person purporting to be the next friend of the alleged minor, it was *held* that such a plaint was not merely a defective pleading, the deficiencies of which might be cured by amendment under the order of the court, but it was a totally invalid document which could give the court no jurisdiction to proceed with the suit. *Bhoorania* v. *Bharat Singh*, I. L. R., 20 All., 99, followed. *Baidea* v. *John Smith*, I. L. R., 22 All., 55, distinguished.

Rahul Amin *v.* Shankar Lal, I. L. R., 45 All.... ... 701

CIVIL PROCEDURE CODE, SECTION 102. *See* Execution of Decree ... 359

CIVIL PROCEDURE CODE, SECTION 109.—*Appeal to His Majesty in Council —"Final order"—Order determining a substantial question in issue and directing the preparation, by the executing court, of a decree under order XXXIV, rule 6, of the Code of Civil Procedure.*] In an appeal arising out of the execution of a mortgage-decree valued at over Rs. 10,000, the High Court overruled the lower court on the only really substantial question in issue, namely, that of limitation, and passed an order which amounted to a direction that a decree under order XXXIV, rule 6, of the Code of Civil Procedure should be prepared, the details of which were left for the execution court to settle. *Held*, that the order might fairly be described as a final order within the meaning of that expression as used in section 109 of the Civil Procedure Code, and that a certificate might be granted that the case was a fit one for appeal to His Majesty in Council. *Rai Nath Dass* v. *Sohan Bibi*, I. L. R., 31 All., 545, and *Ahmad Husain* v. *Gobind Krishna Narain*, I. L. R., 33 All., 391, distinguished. *Salaki Mukhar Hossein* v. *Mussamat Bodhi Bibi*, I. L. R., 17 All., 112, referred to.

Santi Lal v. Raj Narain, I. L. R., 45 All. 741

CIVIL PROCEDURE CODE, SECTION 110.—*Appeal to His Majesty in Council—Calculation of value of subject-matter of suit—Interest pendente lite.*] In calculating, for the purposes of an application for leave to appeal to the Privy Council, the value of the subject-matter of the suit, being a suit for sale on a mortgage, interest *pendente lite* and up to the date fixed by the decree for payment should be included.

Gajadhar Mahton v. Ambika Prasad Tiwari, I. L. R., 45 All. 133

CIVIL PROCEDURE CODE, SECTION 110.—*Application for leave to appeal to His Majesty in Council—"Substantial question of law."*] In an application for leave to appeal to His Majesty in Council two pleas were taken: (1) that the High Court was wrong in deciding that the suit was not barred by reason of a previous suit *in pari materia* brought by the predecessor in interest of the plaintiff

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CIVIL PROCEDURE CODE, SECTION 145—*Execution of decree—Immovable property hypothecated as security—Mode of realization of security bond.*] Where a person stands surety for the due performance of a decree and by way of security hypothecates immovable property, without undertaking any personal liability thereunder, then so long as the surety still retains the equity of redemption of the hypothecated property, the security bond can under section 145 of the Code of Civil Procedure be enforced against the property directly by execution, and there is no necessity for the filing of a separate suit on the bond. *Janki Kuar* v. *Sarup Rani*, I. L. R., 17 All., 99, *Mukta Prasad* v. *Mahadeo Prasad*, I. L. R., 38 All., 327, *Raj Raghubar Singh* v. *Jai Indra Bahadur Singh*, I. L. R., 42 All., 158, *Shyam Sundar Lal* v. *Baijnai Jainarayan*, I. L. R., 30 Calc., 1060, and *Subramanian Chettiar* v. *Raja of Ramnad*, I. L. R., 41 Mad., 327, referred to. *Amir* v. *Mahadeo Prasad*, I. L. R., 39 All., 225, distinguished.

Boti Mahalakshmi Bai v. Badan Singh, I. L. R., 45 All. 649

CIVIL PROCEDURE CODE, SECTION 149; ORDER VII, RULE 11, CLAUSE (c)—*Plaint insufficiently stamped—Power of court to extend time for making good the deficiency—Limitation.*] Where a plaint is filed in time and is correctly valued but insufficiently stamped the court has power to grant time for making good the deficiency, and the suit is not affected by the fact that the period of limitation for it may expire during the time so granted. *Jainti Prasad* v. *Bachu Singh*, I. L. R., 15 All., 65, held to be no longer law. *Gaya Loan Office Limited* v. *Awadh Behari Lal*, I Patna L. J., 420, referred to.

Ram Dayal v. Sher Singh, I. L. R., 45 All. 519

CIVIL PROCEDURE CODE, ORDER II, RULE 2—*Suit by heir to recover property sold by deceased after setting aside sale-deed—Suit for possession of property not previously alienated—Different causes of action.*] Plaintiff, alleging that he was heir to the extent of one-third to one AA deceased, sued first in respect of certain specific property, which had been alienated by AA in his life-time, to have the sale set aside and to recover the property sold, in virtue of his title as heir, and, subsequently, for partition or joint possession of other properties of the deceased which had not been alienated by him.

Held that the cause of action for the latter suit was not the same as the cause of action for the former and that order II, rule 2, of the Code of Civil Procedure was not a bar. *Murti* v. *Bhola Ram*, I. L. R., 16 All., 165, and *Sonu* v. *Bahinibai*, I. L. R., 40 Bom., 1351, referred to.

Muhammad Umar Khan v. Ummatul Rahim Bibi, I. L. R., 45 All. 376

CIVIL PROCEDURE CODE, ORDER II, RULE 2, *See* Act No. I of 1877, sections 19 and 20 878

CIVIL PROCEDURE CODE, ORDER VI, RULE 4—*Pleadings—Duty of trial courts as to regulation of pleadings—Calling for further particulars—Costs.*] It is the duty of the trial Judge to see that in all cases the parties plead their cases as plainly, fully and clearly that each side knows the nature of the case which has to be met, and this rule is one of general application.

The trial Judge should, when ordering further particulars of a claim or statement of defence to be given, order the party in default to pay a specified sum of costs to the other side for the costs occasioned by the application; such payment to be made on or before the delivery of the particulars. If the order is disobeyed, and the plaintiff is in default, he should have his action stayed, and if the defendant is in default, his defence should be struck out.

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Partnership [illegible] careful at the trial [illegible] caused by the [illegible] that as his [illegible]

[illegible] 621

Civil Procedure [illegible] *decree-holder* [illegible] *Held* [illegible] was held refused to [illegible] suit based [illegible] defendant was [illegible] the plaintiff's [illegible] *Hari Khan* v. [illegible] *Abdul Karim* v. [illegible] *Gobind Chandra* [illegible] referred to.

[illegible] 61

Civil Procedure Code, [illegible] *Procedure*—*Ex parte decree*—*Application to set aside ex parte decree*]—In a suit for [illegible] property against several [illegible] only one of the [illegible] ment, but, [illegible] adjournment was refused, [illegible] the defendants were present [illegible] decree. This application was not [illegible] hearing a decree was passed [illegible]

Held on appeal by the plaintiff that it must be dismissed as the lower court was, under [illegible] Procedure, [illegible] under IX of the Code, and that the [illegible] taken out [illegible] entitled to apply under rule [illegible] ex parte decree set aside. *Bhai Khan* v. *Hamant* [illegible] All., 480, and *Ind* [illegible] referred to.

Ram Charan Lal v. Raghubir Singh, I. L. R., 43 All ... 639

Civil Procedure Code, [illegible] ... 462

Civil Procedure Code, order XXI, rule 2, clause (3)—*Compromise decree—Payment to person other than decree-holder—Payment to be certified*]—Where a payment has to be made [illegible] a compromise decree, the fact that such payment is to be made to a third party and not to the decree-holder does not relieve the party who is responsible therefor from the necessity of certifying such payment, when made, to the court concerned.

Mahadeo Prasad v. Muammad Hamidan, I. L. R., 43 All ... 761

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CIVIL PROCEDURE CODE, ORDER XXI, RULE 15—*Execution of decree—Joint decree for costs against one defendant—Payment of the entire amount of costs out of court to one plaintiff only no defence to an application for execution of the decree for costs by the remaining plaintiffs.*] In a suit for partition there were fifteen plaintiffs and one defendant. The plaintiffs obtained a joint decree for costs against the defendant. The defendant paid the whole of the costs awarded to one of the plaintiffs, who was his sister, and she certified to the court that she had realized the full amount of the costs awarded.

Held, on application being made by the remaining plaintiffs for execution of the entire decree for costs, that the payment (if it was made) of the full amount of the costs to one only of the joint decree-holders and the certifying of such payment to the court was no defence to the application of the remaining plaintiffs, which was granted to the extent of their share of the costs.

Umrao Beg v. Mukhtar Beg, I. L. R., 45 All. ... 401

CIVIL PROCEDURE CODE, ORDER XXI, RULES 58 AND 63—*Execution of decree—Order refusing to entertain objection to attachment—Order against objector—Suit for possession of attached property—Limitation—Act No. IX of 1908 (Indian Limitation Act), schedule I, article* 11.] An order refusing to entertain an objection to the attachment of property in execution of a decree upon the ground that it is filed too late falls within the purview of order XXI, rule 63, of the Code of Civil Procedure. A suit, therefore, to recover possession of the attached property after the objection has been disallowed must be filed within a year from the date of such order. *Venkataratnam* v. *Ranganayakamma*, I. L. R., 41 Mad., 985, followed.

Gobardhan Das v. Mukundi Lal, I. L. R., 45 All. ... 488

CIVIL PROCEDURE CODE, ORDER XXI, RULES 88, 92; RULES FRAMED UNDER SECTION 70, RULE 32(3)—*Auction sale—Co-sharer and outsider—Equal bids—Sale confirmed in outsider's favour, in co-sharer's absence—Suit for recovery of possession.*] At an auction sale of zamindari property two persons bid level through the sale. One of such bidders claimed to be a co-sharer as regards the property to be sold, and his object was to take advantage of the provisions of order XXI, rule 88, of the Code of Civil Procedure. The sale-officer reported the case to the Collector, who fixed a date and issued notice to both bidders. On the date fixed the co-sharer did not appear and proved that he actually was a co-sharer, and the sale was confirmed in favour of the other bidder.

Held it was not open to the co-sharer to file a suit for the recovery of possession of the property sold, in the face of the order of confirmation.

Badri Singh v. Tulsi Ram, I. L. R., 45 All. 203

CIVIL PROCEDURE CODE, ORDER XXXII, RULE 4 (4)—*Guardian ad litem—Application by a vakil appointed by the court as guardian of minor respondents for an order on the appellant to deposit costs of minors.*] A vakil of the court appointed by the court as guardian *ad litem* of a minor litigant is an officer of the court for the purposes of order XXXII, rule 4, of the Code of Civil Procedure. The appellate court has therefore jurisdiction to make at the request of such guardian an order under that rule for the deposit of costs likely to be incurred by the minor in defending the appeal.

Mohun Lal v. Ganga Prasad, I. L. R., 45 All.

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CIVIL PROCEDURE CODE, ORDER XXXIII, RULE 5, ORDER [illegible] *Application for leave to sue as a pauper, [illegible] of which a court may reject [illegible] decision as to [illegible] of Order XXXIII [illegible] unable [illegible] a pauper, if [illegible] Pleader [illegible] of the [illegible] the question [illegible] the application [illegible] Bhagwan Das v. Bhagwan Das, I. L. R., 20 All., 250, referred to.*

Dharam Das v. Nand Kishore, I. L. R., 6 All. ... 518

CIVIL PROCEDURE CODE, ORDER XXXIV, [illegible] *Appeal against [illegible] Decree or order.*] On appeal [illegible] mortgage [illegible] the time [illegible] awarded [illegible] holder applied [illegible] to him by the High Court.

Held that the [illegible] of the High Court, [illegible] realize the [illegible] prepared, [illegible] v. *Ram Sahai*, I. L. R., 17 All., [illegible].

Mahomed Hadi v. [illegible], I. L. R., 17 All. 470

CIVIL PROCEDURE CODE, ORDER XLI, RULE 4. *Decree. Suit by three plaintiffs jointly. Appeal by one. Decree reversed in favour of all co-plaintiffs. Appeal by the non-appealing plaintiffs.*] A suit for [illegible] jointly in respect of [illegible] of the [illegible] first instance found that the [illegible] set up as the basis of the claim, was not [illegible] dismissed the suit. One of the plaintiffs appealed. He stated that he was appealing on his own behalf and on behalf of the other two co-plaintiffs, but he did not make the latter parties to the appeal. On this appeal the lower appellate court reversed the decree of the first court and passed a decree in favour of the three plaintiffs jointly. At the time of passing the decree, however, one of the non-appealing plaintiffs was dead.

Held that the decree so passed was void and inoperative of execution. *Balaram Pal v. Fanindra Majhi*, 23 Indian Cases, 844, referred to.

Ambika Prasad v. Jhinak Singh, I. L. R., 45 All. ... 286

CIVIL PROCEDURE CODE, ORDER XLI, RULE 23. *Remand. Unnecessary remand of whole case by lower appellate court. Procedure.*] In a suit for recovery of possession of a house and damages against the defendants who were alleged to be trespassers, defendants pleaded adverse possession. The trial court found in their favour and dismissed the suit. On appeal by the plaintiff, the lower appellate court found in favour of the appellant on the question of title as well as of possession, but as there was no finding by the first court on the question of damages, it remanded the whole

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case to the first court under order XLI, rule 23, of the Code of Civil Procedure. *Held*, that the order was an improper one. The lower appellate court should either have remitted an issue on the question of damages or should have determined the question itself.

Abdullah Khan v. Muhammad Maqbul Hussin, I. L. R., 45 All. 565

CIVIL PROCEDURE CODE, ORDER XLIII, RULE 1, *See* Letters Patent, section 10 60

CIVIL PROCEDURE CODE, SCHEDULE II, PARAGRAPH 15—*Arbitration—Award in favour of minors—Agreement by next friend to set aside award and refer matters in dispute again to arbitration—Court not competent to set aside previous award.*] The plaintiffs, who were minors, held an award in their favour. The defendant objected to the award. Pending the decision of the defendant's objections, the parties came to an agreement by which the first award was to be cancelled and the dispute again referred to arbitration, the vakils for the respective parties to act as arbitrators, and the Court made an order accordingly.

Held that the Court had no power to set aside the first award, except on one or other of the grounds provided for in the second schedule to the Code of Civil Procedure.

Jhinku Singh v. Sital Singh, I. L. R., 45 All.... ... 203

CIVIL PROCEDURE CODE, SCHEDULE II, PARAGRAPHS 15 AND 16—*Suit for partition—Suit referred to arbitration in absence of one defendant who failed to appear—Decree in accordance with award—Appeal.*] *H*, a member of a joint Hindu family, filed a suit for partition of the family property. *S*, one of the defendants, took no part in the proceedings, which were carried on *ex parte* so far as he was concerned. All the parties except *S* agreed to refer the dispute to arbitration, and it was so referred and an award was made. Both *H* and *S* filed objections to the award; but those were rejected, and a decree was passed which was in accordance with and not in excess of the award.

Held that no appeal lay from such decree. *Lutawan* v. *Lachya*, I. L. R., 36 All., 69, followed.

Hari Shankar v. Ram Piari, I. L. R., 45 All. ... 441

COCAINE, *See* Act (Local) No. IV of 1910, section 60A 541

COMMON GAMING HOUSE. *See* Act No. III of 1867 268

COMMON GAMING HOUSE, *See* Act No. III of 1867, sections 4, 5 and 6 ... 671

COMPENSATION, *See* Act No. XLIII of 1859, section 213 616

COMPENSATION, *See* Criminal Procedure Code, section 250 474

COMPENSATION, Order for—, *See* Criminal Procedure Code, sections 107 and 250 868

COMPOUNDING OFFENCES. *See* Criminal Procedure Code, sections 345(2) and 489 17

COMPOUNDING OFFENCES. *See* Act No. XLV of 1860, sections 504, 323 145

COMPROMISE, *See* Civil Procedure Code, order XXI, rule 2, clause (3) 304

COMPROMISE. *See* Criminal Procedure Code, section 145 102

CONFESSION, *See* Act No. I of 1872, section 24 ... 300, 633

CONFESSION, *See* Act No. I of 1872, section 30 323

CONFESSION. *See* Criminal Procedure Code, section 533 166

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Construction of document. *See* Act No. I of 1865, sections 92 and 93 ... 396

Construction of document, *See* Act No. IV of 1882, section 54 ... 74

Construction of document, *See* Pre-emption 450, 453, 553

Construction of document, *See* Wajib-ul-arz 321

Construction of document. *See* Will 107

Construction of document. *See* Rent by Co-sharer 56, 340

Contract. *Damages for breach. Agreement to accept rate laid down by a committee of experts for assessing damages in case of breach —Parties not permitted to fall back upon ordinary rules for assessment of damages.* The parties to a contract for the sale of dhotis agreed to be bound by the decision of a committee of cloth merchants of the town in which they resided, fixing the scale according to which damages for the breach of such contracts should be computed.

Held that, having accepted this decision, the party damnified (whichever it might be) by a breach of the contract could not, when payment was not made in accordance with the terms thereof,

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be allowed to fall back on the original contract and claim the larger damages which might have been obtainable thereunder. *Manohur Koyal* v. *Thakur Das Naskar*, I. L. R., 15 Calc., 319, not followed.

Ram Nath v. Mannu Lal, I. L. R., 45 All. 472

CONTRACT. Breach of—by workman, *See* Act No. XIII of 1859, sections 2 and 4 ... ... 691, 700

CONTRACT. Illegal—, *See* Act No. IX of 1872, section 24 ... 621

CONTRIBUTION—*Suit brought by two sets of plaintiffs jointly—Suit dismissed with decree for costs against both sets—Decree executed against one set only—Suit for contribution maintainable by the other.*] Two branches of a Hindu family combined to bring a suit against the third branch, and lost, the consequence being a decree against the plaintiffs for costs in both the original and appellate courts. The defendants executed their decree for costs against one set of plaintiffs only and these then sued the other set for contribution.

Held that there was no *a priori* objection to such a suit, and the plaintiffs were entitled to a decree. *Ram Saroop* v. *Bajnath*, I. L. R., 43 All., 77, followed. *Kishna Ram* v. *Rukmini Sewak Singh*, I. L. R., 9 All., 22, and *Shakul Kameed Alim Sahib* v. *Syed Ebrahim Sahib*, I. L. R., 26 Mad., 373, referred to.

Parsotam Das Kolapuri v. Lachmi Narain, I. L. R., 45 All. 99

COSTS, *See* Civil Procedure Code, order VI, rule 4 624

COSTS, *See* Civil Procedure Code, order XXI, rule 15 101

COSTS, *See* Civil Procedure Code, order XXXII, rule 4 (4) ... 395

COSTS. Decree for———, *See* Contribution 99

COURT FEE, *See* Civil Procedure Code, section 149; order VII, rule 11, clause (c) 513

COURT FEE, *See* Act No. VII of 1870, section 7(v); schedule I, article 1 537

COURT FEE. *See* Act No. VII of 1870, section 7(ix) 154

COURT FEE. *See* Act No. VII of 1870, schedule I, article 1 ... 216

COURT OF WARDS, *See* Act (Local) No. IV of 1912, section 54 ... 563

CRIMINAL BREACH OF TRUST, *See* Act No. XLV of 1860, section 420... 598

CRIMINAL BREACH OF TRUST. *See* Act No. XLV of 1860, section 420 ... 262

CRIMINAL PROCEDURE CODE, SECTION 34—*Sentence—Appeal—Enhancement of sentence by appellate court.*] A magistrate of the second class having convicted an accused person under section 406 of the Indian Penal Code sentenced him to three months' simple imprisonment. On appeal the appellate court, whilst upholding the conviction, altered the sentence to a fine of Rs. 400 with an alternative term of rigorous imprisonment.

Held that the sentence passed by the appellate court was *ultra vires* of that court.

Emperor v. Muhammad Yakub Ali, I. L. R., 45 All. ... 591

CRIMINAL PROCEDURE CODE, SECTIONS 107 AND 250—*Security to keep the peace—Section 250 not applicable to proceedings under section 107.*] Section 250 of the Code of Criminal Procedure does not apply to proceedings under section 107 of the Code. *Bikkai Rai* v. *Sheopujan*, 7 A. L. J., 143, and *Bindhachal Prasad Rai* v. *Lal Behari Rai*, I. L. R., 36 All., 282, not followed.

Ram Badan Singh v. Janki, I. L. R., 45 All. ... 863

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CRIMINAL PROCEDURE CODE, section [illegible] *Necessity for a full hearing under —Practice in cases where parties have been called upon to show cause* [illegible] under section 110 of the Code of Criminal Procedure, 1882 [illegible] personally, [illegible] of such [illegible]

Held also, that [illegible] to enabling sureties to [illegible] the proposed order. The [illegible] a matter for the discretion of the Court in the circumstances of each case.

Observations on the [illegible] applications for [illegible]

Empress v. Mayappa [illegible] ... 109

CRIMINAL PROCEDURE CODE, section [illegible] *Necessity for a full hearing under —Use of evidence in one proceeding in another* [illegible] Although ordinarily [illegible] case [illegible] the evidence [illegible] Both the [illegible] were evidence [illegible] which the Court will [illegible] nature of the [illegible] for example, a suggestion that the [illegible] under [illegible]

Empress v. Ramiah [illegible] ... 743

CRIMINAL PROCEDURE CODE, [illegible] *High Court's power of revision—Finding of fact as a preliminary to the exercise of jurisdiction under section* [illegible] *Code of Criminal Procedure, 1882—Right of way—Land dedicated to the use of the public as a road way—Land not ceased to be the property of the owner of the soil—Easement Act (V of 1882), section* [illegible] *Land Improvement Loans Act (XIX of 1883), section* [illegible]

The main question before the Magistrate was whether, upon the facts proved, the [illegible] land was merely village waste land or land dedicated to the use of the public as a road way.

Wilson and Tennon, JJ. (dissentiente Dunbar, J.) that the [illegible] under section 133 of the Code of Criminal Procedure, wherein, on the finding that the land in question was a public way, he ordered one of the parties to abate a nuisance for which he was responsible, were a proper subject for the exercise of the High Court's powers of revision.

Observations by Wilson, J., on the facts necessary to support the conclusion of law that land has been validly dedicated to the use of the public as a road way.

Abdul Wahid Khan v. Abdullah Khan, I. L. R., 15 All. ... 650

CRIMINAL PROCEDURE CODE, section 144. *Temporary order passed by District Magistrate prohibiting processions of any kind along certain streets—Power of Local Government to extend such order indefinitely—Act No. XLV of 1860 (Indian Penal Code), section* [illegible] A District Magistrate passed an order under section 144 of the Code of Criminal Procedure forbidding, for reasons set forth therein, the passage of processions, whether religious or otherwise, along particular streets in a certain town. The Local Government subsequently directed, by notification in the Gazette, that this order should remain in force until it was cancelled by a similar notification.

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Held that the Local Government was perfectly competent under sub-section (5) to extend the period of the Magistrate's order and was not limited to any particular kind of procession.

Emperor v. Bhure Mal, I. L. R., 45 All. 526

CRIMINAL PROCEDURE CODE, SECTION 145—*Dispute as to possession of immovable property—Compromise—Suit for determination of title—Estoppel.*] The fact that a compromise has been entered into between the parties to proceedings under section 145 of the Code of Criminal Procedure by which they have agreed to hold the property in dispute in certain defined shares does not imply any decision as to the title to the property nor preclude either party from having recourse to the Civil Court for the determination of that question.

Gopi Das v. Madho Lal, I. L. R., 45 All. 162

CRIMINAL PROCEDURE CODE, SECTION 145, *See* Act No. IX of 1908, schedule I, article 47 806

CRIMINAL PROCEDURE CODE, SECTION 145, *See* Landlord and tenant ... 404

CRIMINAL PROCEDURE CODE, section 164, *See* Act No. I of 1872, section 24 638

CRIMINAL PROCEDURE CODE, SECTION 195 (1)(a). *See* Act No. V of 1861, section 4 135

CRIMINAL PROCEDURE CODE, SECTION 195(b)—*Sanction to prosecute—Necessity of sanction in respect of abetment also.*] In the case of offences in which reference is made in section 195, clause (b), a court taking cognizance of such an offence when that offence has been committed in, or in relation to, any proceeding in any court, or a court taking cognizance of a criminal conspiracy to commit such an offence or of abetment or attempt to commit such an offence, cannot do so unless sanction has been given, not only to the *factum* but to cover the case of each person who is charged with having committed it.

Ram Bilas v. Lachmi Narain, I. L. R., 45 All. ... 140

CRIMINAL PROCEDURE CODE, SECTION 230—*Joint trial—Different accused charged with dacoity and receipt of property stolen in the dacoity—"Same transaction."*] A dacoity was committed in which a large number of currency notes were stolen. Very soon after the dacoity a considerable part of the stolen notes was handed over to two persons in circumstances which left no doubt that they were quite aware how the notes had been obtained. One of such persons had actually been present at the time the dacoity was committed.

Held that these two persons were properly tried on charges under section 412 of the Indian Penal Code jointly with the actual dacoits. *Emperor* v. *Balabhai Hargovind*, 6 Bom., L. R., 617, followed.

Emperor v. Durga Prasad, I. L. R., 45 All. 222

CRIMINAL PROCEDURE CODE, SECTIONS 247 AND 403—Autrefois acquit—*Acquittal under section 247 a bar to further proceedings.*] *Held* that an acquittal under section 247 of the Code of Criminal Procedure, equally with an acquittal after trial on the merits, acts as a bar to further proceedings, by virtue of section 403 of the Code. *Empress* v. *Bhawani Prasad*, Weekly Notes, 1885, p. 43, *Panchu Singh* v. *Umar Mahomed Sheikh*, 4 C. W. N., 346, and *In the matter of Gangiliapu Paddaya of Palakot*, I. L. R., 34 Mad., 253, referred to.

Emperor v. Dulla, I. L. R., 45 All. 68

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Criminal Procedure Code, ... 474

Criminal Procedure Code, ... *Held* that, ... witnesses' evidence ... necessary, ... procedure ... should be ... Empress v. Tribeni Sahai, ... Empress, ... Empress v. Hari, ... 230

Criminal Procedure Code, ... tion of ... statements ... examined. That ... evidence which had been already recorded ... and which the accused had had an opportunity of explaining.

Held that ... order was an error, ... proceedings. Nabukumara Ayyar v. Emperor, I. L. R., 28 Mad., 61 (1904), ... Emperor v. Bechu Chandra, I. L. R., 15 All. ... 124

Criminal Procedure Code, sections 248(b) and 429. *Revision—Power of High Court in revision to give leave to compound.* The High Court can, in the exercise of its powers of revision under section 439 of the Code of Criminal Procedure, allow the compounding of an offence in a case in which the court of appeal could allow composition to be made. *Emperor* v. *Ram Payan*, I. L. R., 32 All., 153, followed.

Emperor v. Shaba, I. L. R., 37 All. 17

Criminal Procedure Code, sections 351, *See* Act No. I of 1872, section 30 893

Criminal Procedure Code, section 439. *Revision—Practice—Application made by a third party on behalf of convicts who had a right of appeal but refused to exercise it.*] Although the High Court has power to interfere in revision, on a matter which calls for its interference being brought to its notice in any manner whatso-

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ever, not necessarily by means of an application on the part of a person convicted, yet, where the convicted persons concerned, who might have appealed but did not appeal or apply in revision, because they denied the jurisdiction of the court which had tried and sentenced them, were all of full age and more or less well educated, the Court should be loath to take action on an application for revision presented by a third party on his own responsibility and without authority from the convicts on whose behalf it was presented.

In the matter of the petition of Narain Prasad Nigam, I. L. R., 45 All. 129

CRIMINAL PROCEDURE CODE, SECTION 522—*Order for restoration of property refused by trial court—Revision—Jurisdiction of High Court.* Where a trial court, in the exercise of the discretion conferred upon it by section 522 of the Code of Criminal Procedure, has declined to pass an order under that section for the restoration of property, a court of appeal or revision cannot compel it to do so, nor will such court ordinarily, even if it has the power to do so, pass an order under section 522 itself. *Bhayabat Shaha* v. *Sadigue Ustagar*, I. L. R., 39 Calc., 1050 and *Mahammad Din* v. *The Crown*, (1919) Punj. Rec., Cr. J., p. 36, referred to.

Aziz Ahmad *v.* Buddhu Khan, I. L. R., 45 All. ... 553

CRIMINAL PROCEDURE CODE, SECTION 522. *See* Act No. XLV of 1860, section 447 26

CRIMINAL PROCEDURE CODE, SECTION 526—*Act No. XIII of* 1859 (*Workman's Breach of Contract Act*), *section* 2—"*Inquiry*"—*Transfer.*] *Held* that an inquiry under the provisions of Act No. XIII of 1859 is not outside the purview of section 526 of the Code of Criminal Procedure, but may be transferred by the High Court to any other court subordinate to it of equal or superior jurisdiction to that in which it was initiated.

Bansi v. Lakshmi Das, I. L. R., 45 All. 700

CRIMINAL PROCEDURE CODE, SECTION 533—*Confession—Admissibility of confession recorded in English.*] The confession of an accused charged with murder was recorded by a Magistrate in the following circumstances. The accused's handcuffs were removed and all policemen were sent out of the Magistrate's room. The Magistrate then, having satisfied himself that the accused had not been tutored, proceeded to record his confession in English in a narrative form. He then translated what he had written to the accused who admitted it to be correct and affixed his thumb impression.

Held that the confession was admissible, any defects in the mode of recording it being cured by section 533 of the Code of Criminal Procedure. *Queen-Empress* v. *Bachanna*, Weekly Notes, 1891, p. 56, and *Queen-Empress* v. *Anta*, Weekly Notes, 1892, p. 60, followed. *Queen-Empress* v. *Raghu*, I. L. R., 23 Bom., 221, referred to.

Emperor *v.* Deo Dat, I. L. R., 45 All. 166

CRIMINAL TRESPASS. *See* Act No. XLV of 1860, section 447 ... 26

CROSS OBJECTIONS, *See* Act No. VII of 1870, section 7(5); schedule I, article 1 68

CULPABLE HOMICIDE, *See* Act No. XLV of 1860, sections 299, 300 ... 557

CULPABLE HOMICIDE. *See* Act No. XLV of 1860, section 302 ... 130

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Pleader, ... order XVII, rule ... 614

Pleader, Power ... *See* ... 137

Pleader, Mode of ... 276

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Pleader (a minor), agreement ... de ... to dispose ... by ... Held, ... was ... property ... share ... proceeds ... daughters, but ... property ... son of the deceased ...

Held that ... by which the property ... benefit of ... to operation ... *Lakshmi Ammal* ..., 1 L. R., 40 All., 407, and *Harder* v. *Thompson Singh*, ... W. ..., referred to.

Bahadur Singh v. ... Prasad, I. L. R., 40 All. ... 277

Estoppel. *See* Act No. IX of 1908, schedule I, articles 91, 118 and 120 ... 169

Estoppel. *See* Criminal Procedure Code, section 145 ... 163

Estoppel, *See* Hindu law ... 858

Evidence, *See* Act No. I of 1872, section ... 465

Evidence, *See* Criminal Procedure Code, section 537 ... 238

Evidence, *See* Hindu law ... 89

Evidence, Admissibility of, *See* Act No. I of 1872, section 21 ... 633

Evidence, Admissibility of, *See* Act No. I of 1872, section 32 ... 91

"Exact," *See* Act (Local) No. II of 1901, ... 7(3) and 10(7) ... 725

EXECUTION OF DECREE. *Preliminary decree passed against a deceased defendant—Final decree passed, though errone ously, against a person as being his representative—Distinction between such a decree and a decree passed against a person who was dead before*

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the date of the decree.] A preliminary decree in a suit for sale on a mortgage was passed against several defendants, amongst whom were *Z* and *N*. At the time of the preparation of the final decree the court was informed that *Z* had died in the interval and *N* was his legal representative; and the final decree was passed against *N* personally and as representative of *Z*. After this, an application to set aside the preliminary decree on the ground that *Z* had died prior to its passing was rejected in the absence of evidence as to the date of *Z's* death. When the final decree came to be executed, objection was again raised that *Z* had died before the passing of the preliminary decree, and in this proceeding evidence was taken as to the date of *Z's* death and it was found that he had died before the preliminary decree was passed.

Held that it was not the inevitable result of this finding that the final decree was a nullity, because it had in fact been passed not against *Z*, deceased, but against *N* in both capacities, and it was not in the category of decrees passed by accident or mistake against a defendant who had died before the passing thereof.

Ram Sarup v. Narain Das, I. L. R., 45 All. 198

EXECUTION OF DECREE—*Money paid by one decree-holder to another as a condition precedent to the former being permitted to bid at a sale in execution of his own decree—Sale set aside—Suit to recover payment—Civil Procedure Code, section 102—Small Cause Court suit—Appeal.*] K, holding a decree against A, sought to bring to sale certain immovable property supposed to belong to A. KS, who also held decrees against A, applied for rateable distribution of the sale proceeds. K then applied to the court for leave to bid for the attached property, and the court granted leave, but on the condition that he paid off the decrees held by KS. This K did, and then purchased the property in question himself. The sale was, however, set aside at the instance of a person who established his own title to the property sold. Thereupon K sued KS to recover the money which he had paid in satisfaction of the decrees held by the defendant.

Held that the suit was one of the nature cognizable by a court of small causes and consequently, having regard to its valuation, no second appeal would lie.

Reshu Saran v. Khairati Lal, I. L. R., 45 All. ... 859

EXECUTION OF DECREE—*Res judicata—Series of applications relating to the execution of a decree—Final determination of a necessary issue between the parties—Court not competent to go behind that determination on a subsequent application for execution.*] In the case of a decree passed in a suit against a firm, there is nothing to prevent a succession of applications for execution directed against persons who are ascertained to be, or believed to be, partners in the particular venture out of which the decree has arisen. But if there has been a previous application, in which there has been a definite decision affecting a particular piece of property or a particular person, and that decision has been allowed to become a final decision between the parties, then if in any subsequent proceedings, e.g., on an application under order XXI, rule 50(2), the point again becomes material, the parties are bound by that previous decision and the matter cannot be re-opened.

Kapur Chand v. Kanhaiya Lal, I. L. R., 45 All. ... 795

EXECUTION OF DECREE, *See* Act No. IX of 1908, section 18 ... 812

EXECUTION OF DECREE, *See* Act No. IV of [illegible] ... 986

EXECUTION OF DECREE, *See* Arbitration 628

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For ... 47 ... 56, 353

For ... 52 ... 155

For ... 475 ... 423

For ... 241, also IX, under XLVII, rule 1 244

For ... 240 ... 630

For 276

For ... XXI, rules 5, 6, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 39, 40, 41, 42, 43, 44, 45, 46, 47, 48, 49,

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who can file an appeal on behalf of the minor. *Shambhu v. Kanhaya*, I. L. R., 44 All., 619, followed.

Bhagelu *v.* Dharma, I. L. R., 45 All. 629

GUARDIAN *ad litem*, *See* Civil Procedure Code, order XXXII, rule 4(4) 395

GUARDIAN AND MINOR—*Money borrowed by guardian for benefit of minor—Legal necessity—How far creditor is bound to inquire into the existence of necessity for borrowing.*] If a creditor, dealing with the manager of a family or, for the matter of that, with the guardian of a minor, does make inquiries and acts honestly, the real existence of an alleged and reasonable necessity is sufficient to validate the debt and he is not bound to see to the application of the money. *Kandhia Lal v. Muna Bibi*, I. L. R., 20 All., 135, followed.

Raghubans Upadhya *v.* Inderjit Singh, I. L. R., 45 All. 77

GUARDIAN AND MINOR—*Application for removal of guardian of person—Repeated applications on similar grounds*—Res judicata.] *Held* that the duly appointed guardian of the person of a minor should not be called upon to resist successive applications for his or her removal based upon the same set of facts.

Bhagwan Das *v.* Mangalia, I. L. R., 45 All. 196

HIGH COURT, *See* Civil Procedure Code, section 115 383

HIGH COURT. Jurisdiction of—, *See* Act (Local) No. II of 1901, section 177 507

HIGH COURT. Jurisdiction of—, *See* Criminal Procedure Code, section 522 563

HIGH COURT. Jurisdiction of—, *See* Review of judgment ... 458

HIGH COURT. Revisional powers of—, *See* Act No. XVIII of 1879, section 30 676

HINDU LAW—*Adoption—Evidence—Proof of adoption after the death of the three persons immediately concerned.*] An adoption was alleged to have taken place some 48 years *ante litem motam*. All the parties immediately concerned were dead. It appeared that the adoption had been recited by the natural father in a formal deed of gift; the adopted son had succeeded in due course to the property of his adoptive father, and no objection to the adoption had been raised by any member of either family.

Held that the adoption should be considered as a legal and valid adoption, notwithstanding that there was no evidence available of the usual ceremonies of adoption having been performed. *Bal Gangadhar Tilak v. Shrinivas Pandit*, I. L. R., 29 Bom., 441: L. R., 42 I. A., 135, *Chandra Kunwar v. Chaudhri Narpat Singh*, I. L. R., 29 All., 184, and *Har Shankar Partab Singh v. Lal Raghuraj Singh*, I. L. R., 29 All., 519, referred to.

Chhote Lal *v.* Chandra Bhan, I. L. R., 45 All. ... 59

HINDU LAW—"*Antecedent debt*"—*Decree for pre-emption—Money required to take advantage of a decree for pre-emption not an antecedent debt.*] Money needed to pay up a decree for pre-emption in favour of the borrower is not an "antecedent debt" such as will support a mortgage of joint family property. *Nathu v. Kundan Lal*, I. L. R., 23 All., 242, dissented from.

Chaturbhuj *v.* Govind Ram, I. L. R., 45 All.... ... 607

HINDU LAW—*Hindu widow—Alienation of property of husband—Legal necessity—Marriage of daughter—Extent to which alienation is permissible.*] The provision of a dowry for a daughter is a matter of legal necessity which will justify the alienation by a Hindu widow of a larger or smaller portion of her husband's

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property. No hard and fast rule can be laid down as to what proportion of the property may be alienated; but where the daughter was blind and a cripple and the property was small

EXECUTION—Rs. 500 only in value—allowance of the sale—Act if was upheld, grave or permissible—*Ayyar* v. *Ayyar*, I. L. R., 27 Calc., 1 and *Lamakamani Iyaar* v. *Ayyar*, I. L. R., 22 Mad., 113, referred to.

Bhawani Shahai v. Bhagwan Das, I. L. R., 15 All. 297

HINDU LAW—*Hindu widow—Alienation by widow of property of deceased husband made with express consent of reversioner—Reversioner not permitted to repudiate consent on succeeding to property—Estoppel*—Held that a reversioner to the estate of a deceased, separated Hindu, who has expressly consented to an alienation of property forming part of the estate made by the widow in possession, cannot, on succeeding to the estate after the widow's death, repudiate her action and sue to recover possession of the property alienated by the widow. *Rajmani Kunwar* v. *Mahtab Kunwar*, I. L. R., 20 All., 1, *Ramasami Gounden* v. *Nachiappa Gounden*, I. L. R., 12 Mad., 369, *Ram Lall Thakur* v. *Kashee Nath Lahiri Debi*, I. L. R., 24 Calc., [illegible] *Ramkishen Ramchunder*, I. L. R., 10 Calc., [illegible] I. L. R., 46 Penn., 293, referred to.

Held [illegible] affected by the [illegible] consented to the alienation, had [illegible] every decree in respect of half the property sued by the widow.

Fateh Singh v. Thakur Bakhsh Singh Maharaj, I. L. R., 15 All. 332

HINDU LAW—*Hindu widow—Gift of dividend property made with the consent of the next reversioner—Power of such gift as against next reversioner*—One Durga Prasad, a separated Hindu, [illegible] and a daughter. The daughter had a son, Champa Prasad, who was unmarried, involvent, and [illegible] Durga Prasad on the death of Durga Prasad's widow, her daughter proceeded, with the concurrence of the next reversioner, the husband of Champa Prasad, to make a gift of the whole property in favour of Hardar Prasad.

Held, on suit by one of the next reversioners of the donor, that the gift in question was not valid as affecting Champa Prasad's right to succeed on the death of his mother, and of Champa Prasad succeeded the claims of his next of kin were asserted. *Ramasami Gounden* v. *Nachiappa Gounden*, I. L. R., 12 Mad., 369, discussed.

Harihar Prasad v. Udai Nath Sahi, I. L. R., 15 All. ... 260

HINDU LAW—*Hindu widow—Property which was really joint family property bequeathed to widow—Property sued for by sons, but for benefit of sons—Minors not [illegible]*—A Hindu died leaving three sons. He also left a will, by which he purported to bequeath certain property, which was joint ancestral property, to his widow. The widow mortgaged the property, and on the [illegible] of her minor sons, but as full owner, with such [illegible] was employed for the benefit of the sons. The mortgagees sued on their mortgage, and the two [illegible] were made parties to the suit.

Held that the sons could not be in any way affected by the mortgage executed by their mother. *Palmer* and *South* v. *Clancy*, I. L. R., 21 All., 296; L. R., 26 I. A., 102, referred to.

Nandan Prasad v. Abdul Aziz, I. L. R., 15 All. ... 497

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HINDU LAW—*Hindu widow—Acceleration of estate in favour of nearest reversioner—Provision for maintenance of widow.* Although the gift of an estate by a Hindu widow in possession in favour of the next reversioner must, in order to operate as an acceleration of the estate to the latter, be a gift of the entire estate, nevertheless a reasonable provision for the maintenance of the widow will not vitiate such a gift. *Rangasami Gounden* v. *Nachiappa Gounden*, I. L. R., 42 Mad., 523, *Bhagwat Koer* v. *Dhanukdhari Prashad Singh*, L. R., 46 I. A., 259; I. L. R., 47 Calc., 466, *Sureshwar Misser* v. *Maheshrani Misrain*, L. R., 47 I. A., 233; I. L. R., 48 Calc., 100 and *Angamuthu Chetti* v. *Varatharajula Chetti*, I. L. R., 42 Mad., 854, referred to.

Ram Adhar Singh v. Ram Manohar Singh, I. L. R., 45 All. 610

HINDU LAW—*Hindu widow—Tenancy in possession of widow sold in execution of a decree for rent—Title of auction-purchaser as against remote reversioners of husband.*] A Hindu widow was in possession as such of a fixed-rate holding, part of the estate of her husband. The holding was sold in execution of a decree for arrears of rent in respect of another holding inherited from her husband and was purchased by *J*, who obtained possession. After the widow's death some remote reversioners to the husband's estate managed to oust *J* and obtained possession of the holding.

Held, on suit by *J* to recover possession, that it was not necessarily the life interest of the widow only which could pass on an execution sale for arrears of rent against her, and as what purported to be sold under the decree was the entire tenure, *J*'s title was good as against all the world except the immediate reversionary heirs, and that *J* was therefore entitled to recover possession. *Sitaram* v. *Khandu*, I. L. R., 45 Bom., 105 and *Maharaja Kesho Prasad Singh* v. *Chandrika Prasad Singh*, I. L. R., 2 Patna, 217, referred to.

Jhari Koeri, v. Bijai Singh, I. L. R., 45 All. ... 613

HINDU LAW—*Hindu widow—Widow taking possession of the property of her deceased husband, but treating it as her own absolute property—Adverse possession.*] Where a Hindu widow—the widow of one of four brothers who were not definitely shown to have separated—took possession of the share of her deceased husband, had her own name recorded in respect thereof, and dealt with the property for a series of years as if it were her own absolute property, it was *held* that, in the absence of any admission on the part of the widow that her possession was no more than that of the widow of a separated Hindu in possession as such of the property of her late husband, her possession must be taken to be adverse to the surviving brothers. *Lachhan Kunwar* v. *Manorath Ram*, I. L. R., 22 Calc., 446, and *Satgur Prasad* v. *Raj Kishore Lal*, I. L. R., 42 All., 163, referred to. *Baijnath Prasad Singh* v. *Tej Bali Singh*, I. L. R., 38 All., 890, distinguished.

Unan Shankar v. Musammat Aisha Khatun, I. L. R., 45 All. 729

HINDU LAW—*Inheritance—Custom—Exclusion of daughters*—Wajib-ul-arz.] The *wajib-ul-arz* applicable to a village in Oudh stated: "The rule of inheritance and division in this village is that on the death of a co-sharer his sons become owners of his share in equal shares, and the daughter does not get any share by inheritance." Upon an issue whether there was a custom excluding daughters from inheritance in the absence of a son, and in the presence of the sole surviving brother of the last holder:—

Held that upon the true construction of the *wajib-ul-arz* a daughter was not entitled to a share by inheritance in any circum-

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stances, and that the ... to ... to establish the custom.

Query how the ... of all ... of ... of any relation of the ...

... custom ...

P.C., ... I. L. R., 17 All ... 413

HINDU LAW—*Joint Hindu family—Mortgage executed by all the members of a joint family, for all ... Renewal of mortgage by survivors of original executants—Position of sons born during the interval between the two mortgages*—A mortgage of the joint family property was executed by all the members of the family (four in number) who were all ... twelve years later the three survivors executants and the ... of the fourth, who had ... of the ... renewal of the original ... the ... of the ... of the money due on the previous deed.

Held, that a ... subsequently to the date of the first deed ... I. L. R., ... *Ram Singh*, I. L. R., 14 ... ; *referred to*.

Partab Singh v. Pebra Nathe Kuar, I. L. R., 18 All ... 49

HINDU LAW—*Joint Hindu family—Liability ... for father's debts—Execution of ...*—A ... pay his father's debts after ... after the death of the latter.

A, B and C ... got leave of certain property, and to secure due payment ... their own to the ... B and C discharged the ... and ... for ... grandsons became ... family property and not merely ...

Held, on objection taken to the ... was not open to the ... and ... specified property, ... mortgage had been ... the share of his son and grandsons, ... from liability, out of the ... had been declared ... *Sahu Ram Chander* v. *Dilip Singh*, I. L. R., 20 All., 337, and *Chet Kuar* v. *Lare Singh*, I. L. R., 15 All., 301, referred to.

Kishen Singh v. Chhajju Singh, I. L. R., 45 All. ... 180

HINDU LAW—*Joint Hindu family—Capacity of ... Hindus having co-ners of joint family property to make a joint ...*—If a Hindu is the absolute owner of property, whether ancestral or acquired, he can bequeath it by will, and in principle there is no objection to the same power being accorded to two or more Hindus, provided that they together have the entire ownership of the whole of the co-parcenary property. *Nagalutchmee Ammal* v. *Gopee Nathoo Chetty*, 6 Moo. I. A., 309, *Baboo Beer Pertab Sahee* v. *Maharajah Rajendar Pertab Sahee*, 12 Moo. I. A., 1, *Vellaisvarapa Pillai* v. *Pachoha*, 1 Mad., H. C. Rep., 336, *Isteendromohun Tagore* v.

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Ganendromohun Tagore, 18 W. R., P. C., 359, *Munshi Indar Sahai* v. *Kunwar Shiam Bahadur*, 17 C. W. N., 509, *Lakshman Dada Naik* v. *Ram Chandra Dada Naik*, I. L. R., 5 Bom., 43, *Bai Motivahoo* v. *Bai Mamoobai*, L. R., 24 I. A., 93, and *Balgobind Das* v. *Narain Lal*, I. L. R., 15 All., 389, referred to.

Lakshmi Chand v. Musammat Apandi, I. L. R., 45 All. ...245

HINDU LAW—*Joint Hindu family—Sale of family property only in part supported by legal necessity—Suit to recover property from vendee—Form of decree.*] Where property belonging to a joint Hindu family is sold, and the sale is supported by legal necessity in respect of part only of the consideration, the form of decree in a suit by a member of the family, not a party to the sale, to set it aside should be a decree for possession in favour of the plaintiff, subject to his paying to the purchaser so much of the consideration as was required for the necessities of the family.

Dwarka Ram v. Jhulai Pande, I. L. R., 45 All. ... 429

HINDU LAW—*Joint Hindu family—Hundi executed by manager in respect of debts properly incurred for the benefit of the family—Hundi binding on the family as a whole—Position of manager of joint family as compared with that of a widow.*] Where money has been borrowed by the manager of a joint Hindu family *bonâ fide* for legitimate family purposes, he is competent to execute a *hundi* for the loan which will be binding on the family as a whole. *Krishnanand Nath Khare* v. *Raja Ram Singh*, I. L. R., 41 All., 359, followed.

The position of the manager of a joint Hindu family, though in some respects similar to, is by no means identical with that of the widow of a separated Hindu in possession as such of her husband's property.

Raghunath Singh v. Sri Narain, I. L. R., 45 All. ... 434

HINDU LAW—*Joint Hindu family—Simple money decree against father—Joint ancestral property sold in execution—Son's rights to recover property which has passed out of the family.*] Where in execution of a simple money decree against the father of a joint Hindu family the joint ancestral property of the family has been sold by auction and has passed out of the possession of the family, the sons cannot question the sale unless they can show that the simple money debt was illegal or tainted with immorality.

Sripat Singh Dugar v. *Prodyot Kumar Tagore*, I. L. R., 44 Calc., 524, *Girdharee Lall* v. *Kantoo Lall*, L. R., 1 I. A., 321, *Hanmant Kashinath Joshi* v. *Ganesh Annaji Pujari*, I. L. R., 43 Bom., 612, and *Bharat Singh* v. *Sarsuti Singh*, 60 Indian Cases, 137, referred to.

Ram Chandar v. Muhammad Nur, I. L. R., 45 All. ... 545

HINDU LAW—*Joint Hindu family—Private sale of joint family property by father—Grounds upon which sale may be questioned by sons.*] It is only when the property has passed out of the family on account of an antecedent debt or where it has been sold by public auction, that the sons cannot challenge the alienation unless they show that the debt was tainted with immorality. It is not correct to say that in every case where the property has passed out of the family (though under a private sale not in lieu of any antecedent debt and even when the legal necessity has not been established), the sons cannot challenge it unless they show that the debts were contracted for immoral purposes. Where a property has been sold by the father, and the sons bring a suit to recover it, and apparently the property has not been sold away at public auction, then it

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lies upon the transferee to justify the alienation of the estate by showing that the [illegible] that the [illegible]

Suraj Bunsi [illegible], *Nanomi Babuasin* [illegible], *Bhagbut Pershad* [illegible], *Sahu Ram Chandra* [illegible] and *Chandradeo Singh* [illegible], 35 All. 376, referred to.

Sahib Singh [illegible] I. L. R., 45 All. ... 576

HINDU LAW—*Joint Hindu family* [illegible] *mortgage of family property without* [illegible] [illegible]

[illegible] I. L. R., [illegible] All. ... 634

HINDU LAW—*Joint Hindu family*—*Sale of joint ancestral property* [illegible] *purchaser to plead* [illegible] *Proof of legal necessity* [illegible] *objected to by member* [illegible] from the representative [illegible] Hindu [illegible] joint ancestral property [illegible] behalf of the family [illegible] without legal [illegible] *Mahabir* [illegible] I. L. R., 27 All. [illegible]

Where, however, the [illegible] decree [illegible] mortgage transaction [illegible] any member of the family [illegible] not held [illegible] secured by the [illegible] 1921, was incurred for legal [illegible]

Inayat Ullah *v.* Hasha [illegible], I. L. R., 45 All. ... [illegible]

HINDU LAW—*Joint Hindu family*—*Suit by son to recover joint ancestral property in the hands of a transferee*—*Burden of proof.*] Where a Hindu son is suing to recover possession of joint family property from a transferee, and it is [illegible] that the plaintiff is a member of a joint Hindu family, that the property transferred was ancestral property, and that it was transferred without the plaintiff's consent and [illegible] of any antecedent debt or at an auction-sale, the burden lies on the defendant transferee to justify the alienation.

Baijnath Rai *v.* Gokul Rai, I. L. R., 45 All. ... 719

HINDU LAW—*Legal necessity*—*Money raised to defend a member of a joint family accused of murder*—*Mortgage of family property*—*Suit by member of family to set aside mortgage. Burden of proof.*] *RS*, a member of a joint Hindu family, but not the *karta*, was charged with murder, and, in order to procure money for his defence, his two sons and his brother joined him in making a mortgage of part of the joint family property. *RS* was acquitted. Some five years later an uncle of *RS* filed a suit against

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the mortgagee and others for a declaration that the mortgage deed was fictitious and given without any legal necessity. The plaintiff stated in his plaint, *inter alia*, that the expenses of the criminal case had been defrayed entirely from the income of the joint family property.

Held that it lay on the plaintiff to make out a *primâ facie* case that the condition of the family at the time when the criminal charge was brought was such that there was no need for borrowing money. Ordinarily speaking, the defence of a member of the family charged with a serious crime would be a matter which might well justify the borrowing of money as a charge on the property of the joint family. The case was to be distinguished from one in which the lender was trying to recover money advanced on the security of family property by sale of the same. *Beni Ram* v. *Man Singh* I. L. R., 34 All., 4, and *Ramalingam Pillai* v. *Muthayyan* 26 M. L. J., 528, referred to.

Ram Raghubar Lal *v.* Dip Narain Singh, I. L. R., 45 All. 311

HINDU LAW—"*Legal necessity*"—*Money borrowed to carry on litigation not to protect property already in the possession of the family, but to acquire fresh property.*] The borrowing of money to pursue litigation, the object of which is to obtain a possible benefit for the estate, cannot be justified under the doctrine of legal necessity as known to the Hindu law, though possibly if the litigation resulted in benefit to the estate, the debt would be binding in accordance with the principle of equity embodied in the maxim—"He who enjoys the benefit ought to bear the burden also." *Indar Kuar* v. *Lalta Prasad Singh*, I. L. R., 4 All., 532, and *Palaniappa* v. *Deivasikamony*, L. R., 14 I. A., 147, referred to.

Bhagwan Das Naik *v.* Mahadeo Prasad Pal, I. L. R., 45 All. 390

HINDU LAW—*Separated Hindu—Collusive mortgage executed in favour of wife's relations—Suit by reversioners for a declaration that the mortgage was fictitious.*] A separated Hindu, possessed of ample means, and in no need of borrowing money, was induced by his wife to execute a fictitious mortgage in favour of two of her nephews for a sum which was never advanced by them. After executing this mortgage the mortgagor died and his widows entered into possession of his property. *Held* that it was open to the then presumptive reversioners—the widows refusing to take any action in the matter—to sue for a declaration that the mortgage was fictitious and collusive and did not affect their interests in the property mentioned therein, *Ram Anand Kunwar* v. *The Court of Wards*, I. L. R., 6 Calc., 754, referred to.

Suraj Mal *v.* Nathwa, I. L. R., 45 All. 265

HINDU LAW—Stridhan—*Succession—Daughter's daughter or son's son—Nature of stridhan property in the hands of heir.*] *Held* that a daughter taking as heir to her mother property which was *stridhan* in the hands of the mother, does not take it as her own *stridhan*, but takes it with a limited estate, with reverter after her death to the heirs of her predecessor. *Subramanian Chetti* v. *Arunachelam Chetti*, I. L. R., 28 Mad., 1, and *Hari Doyal Singh Sarmana* v. *Grish Chunder Mukerjee*, I. L. R., 17 Calc., 911, referred to.

Held also, that a daughter's daughter is a nearer heir than a son's son to the *stridhan* of a Hindu female. *Sheo Partab Bahadur Singh* v. *The Allahabad Bank*, I. L. R., 25 All., 476, referred to. *Sheo Shankar Lal* v. *Debi Sahai*, I. L. R., 26 All., 468, explained and distinguished.

Sham Bihari *v.* Ram Kali, I. L. R., 15 All. 715

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HINDU LAW, See [illegible] ... 5[illegible]

HINDU LAW, See Act No. IV [illegible] ... 115

[illegible] ... [illegible]

"H[illegible]" See [illegible] ... 3[illegible]

HYDER. See Hindu law ... 474

[illegible] ... 2[illegible]

IDOL [illegible] to sue on behalf of an idol. The original [illegible] being dead, [illegible] of the [illegible] of the idol for the [illegible] and property [illegible]

Held that [illegible] the name of the idol [illegible] property [illegible] law. [illegible]

[illegible] ... [illegible]

IDOL [illegible] property [illegible] idol and an infant [illegible] When [illegible] in the competence of the [illegible] to sue through the agency of the priest of the temple, in respect of [illegible] of the [illegible] property, [illegible] would not fall within the purview of [illegible] the [illegible] behalf of the idol [illegible] of an infant, in the sense that [illegible] might be permitted [illegible] in regard to an alleged [illegible] property dedicated to its worship.

[illegible] ... 2[illegible]

IMMOVABLE PROPERTY Dispute as to possession of [illegible] ... [illegible]

INHERITANCE. See Hindu law 413

INSOLVENCY, See Act No. V [illegible] ... 561

INSTRUMENTS OF GAMING. See Act No. III of 1867 ... 288

INTEREST. See Civil Procedure Code, section [illegible] ... [illegible]

IRREGULARITY. See Criminal Procedure Code, sections [illegible] ... 1[illegible]

JOINT HINDU FAMILY, See Hindu law [illegible]

JOINT OWNERSHIP. Exclusion [illegible] from possession of joint property—Nature of decree to which the person so excluded is entitled.] Where one of several [illegible] has been excluded by the others from possession of the joint property, he is entitled not merely to a declaration of his rights in respect of the property, but to a decree for joint possession also. Sahaljit Singh v. Raj Kumar, I. L. R., 44 All., 5, followed.

Bhirgunath Rai v. Apmaran Rai, I. L. R., 43 All. ... 187

JOINT SUIT. See Civil Procedure Code, order XLI, rule 4 ... [illegible]

JOINT TRIAL. See Criminal Procedure Code, section 239 ... [illegible]

"JUDGMENT," See Letters Patent, section 10 66

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JUDGMENT-DEBTOR. Liability of property of deceased—, *See* Civil Procedure Code, section 53 455

JURISDICTION—*Civil and Revenue Courts—Suit for possession of trees—No question raised as to plaintiff's status as a tenant.*] A suit for a declaration that the plaintiff is in possession of certain trees and for damages for the alleged unlawful appropriation of some of such trees by the defendant, the plaintiff not asking for any declaration of his status as a tenant of the land on which the trees stood, is not a suit which must be brought in a court of revenue, but on the contrary is one which can only be brought in a civil court.

Ram Prasad *v.* Sumer Nath Pande, I. L. R., 45 All. ... 191

JURISDICTION—*Review of judgment—Power of High Court to revise its own order in a criminal appeal.*] The High Court has no power to review its own order dismissing a criminal appeal and confirming the conviction and sentence.

Emperor *v.* Kale, I. L. R., 45 All. 149

JURISDICTION, *See* Landlord and tenant 404

JURISDICTION (Civil and Revenue Courts), *See* Act (Local) No. II of 1901, sections 36 and 167 725

JURISDICTION (Civil and Revenue Courts). *See* Act (Local) No. II of 1901, section 102 7

JURISDICTION (Civil and Revenue Courts), *See* Occupancy holding ... 711

JURISDICTION, *See* Criminal Procedure Code, section 195 ... 656

JURISDICTION (High Court), *See* Review of judgment 468

LAMBARDAR—*Suit by* lambardar *to recover dues—Agreement at settlement that no such dues should be payable—Agreement not repeated at next settlement—Rules framed by Board of Revenue as to remuneration of* lambardar.] At a settlement in 1285 F. it was agreed as between the *lambardar* and the co-sharers that no remuneration, by way of *lambardari* dues, was payable. Subsequently the Board of Revenue framed certain rules as to the payment of *lambardari* dues, one of which was—" (23) Where no amount is so payable (i.e., by virtue of any agreement), or where, upon the expiry of the current settlement of a temporarily settled *mahal*, the agreement is repudiated by either or both the parties thereto, the *lambardar* will be entitled to receive from the co-sharers whom he represents 5 per cent. upon the land revenue payable by them in respect of their shares, or such less amount as may be agreed upon between him and them." At the next settlement in 1312 F. no agreement at all was recorded as to the payment of *lambardari* dues.

Held on suit by the *lambardar* to recover his dues according to the scale laid down by the Board of Revenue, that, even if the effect of the Board's rules was not to bar an agreement by which nothing at all should be paid to the *lambardar*, the agreement set up by the defendants did not endure for longer than the term of the settlement at which it was recorded, and as it had not been renewed at the next settlement the rules took effect and the *lambardar* was entitled to remuneration according to their terms.

Sheo Charan *v.* Panna Lal, I. L. R., 45 All. ... 84

" LAND," *See* Act (Local) No. II of 1901, section 158 640

LANDLORD AND TENANT—*Rights of tenant as regards trees standing on his holding—Occupancy tenant.*] In the absence of a custom or contract to the contrary, an occupancy tenant has a right as against his zamindar to the fruit of trees standing upon his hold-

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LANDLORD AND TENANT *Rent paid to person not entitled to receive it—Suit by rightful owner to recover rent so realized—Money had and received*—*Limitation*—[illegible] defendant, acting as guardian of a minor, sued for and realized certain rents which in law were payable to plaintiff.

Held, on suit by plaintiff to recover the rents so realized, that the suit was one for money had and received to the use of the plaintiff, in respect of which limitation ran from the date of realization, and the plaintiff was entitled to recover notwithstanding that, if she herself had sued at the time the defendant's suit was filed, her claim would have been barred by limitation. *Sundar Lal* v. *Fakir Chand*, I. L. R., 25 All., 64, *Mohammed Wasib* v. *Muhamed Ameer*, I. L. R., 32 Calc., 547, and *Afzal Shah* v. *Muhammad Abdul Karim*, I. L. R., 37 All., 232, referred to.

Mahabir Prasad v. Musammat Parsandi, I. L. R., 45 All. 410

LANDLORD AND TENANT. *See* Act (Local) No. II of 1901, section 87(c) 6

LEASE. *See* Act (Local) No. II of 1916, section 836 207

LEGAL NECESSITY, *See* Guardian and minor 77

LEGAL NECESSITY. *See* Hindu law 207, 311, 339, 429

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LEGAL REPRESENTATIVE. *See* Execution of decree 198

LETTERS PATENT, SECTION 10—"*Judgment*"—*Order refusing to set aside the abatement of an appeal—Civil Procedure Code, order XLIII, rule* 1,—*Appeal—Practice.*] An appeal will lie under section 10 of the Letters Patent from an order of a single Judge of the High Court rejecting an application to set aside the abatement of an appeal. *Wall* v. *Howard*, I. L. R., 17 All., 436, *Tuljaram Row* v. *Alagappa Chettiar*, I. L. R., 35 Mad., 1, and *Kura Mal* v. *Ram Nath*, I. L. R., 28 All., 414, referred to.

Observations on the scope of the term "judgment" as used in section 10 of the Letters Patent.

Sadiq Ali v. Anwar Ali, I. L. R., 45 All. 66

LETTERS PATENT, SECTION 10—*Review of judgment—No appeal from order rejecting application.*] No appeal lies, under section 10 of the Letters Patent, from an order of a single Judge of the High Court rejecting an application for review of judgment. *Muhammad Naim-ullah Khan* v. *Ihsan-ullah Khan*, I. L. R., 14 All., 226, *Piari Lal* v. *Madan Lal*, I. L. R., 39 All., 191, and *Gajadhar Prasad* v. *Nawab Maulvi Muhammad Abdul Majid*, L. R. A., No. 81 of 1921, decided on the 9th February, 1923, followed.

Tirmal Singh v. Kanhaiya Lal, I. L. R., 45 All. ... 535

LIMITATION. *See* Act No. IX of 1872, section 65 179

LIMITATION, *See* Act No. I of 1877, sections 19 and 20 378

LIMITATION. *See* Act No. IX of 1887, section 17 332

LIMITATION. *See* Act No. IX of 1908, section 18 18

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LIMITATION. *See* Act No. IX of 1908, schedule I, articles 80, 116, 132 27

LIMITATION. *See* Act No. IX of 1908, schedule I, articles 91, 118 and 120 169

LIMITATION. *See* Act No. IX of 1908, schedule I, article 118 ... 1

LIMITATION, *See* Act No. IX of 1908, schedule I, article 120 ... 461

LIMITATION. *See* Act (Local) No. II of 1901, section 146 ... 208

LIMITATION. *See* Act (Local) No. II of 1916, section 326 267

LIMITATION, *See* Civil Procedure Code, section 149; order VII, rule 11, clause (*c*) 518

LIMITATION, *See* Civil Procedure Code, order XXI, rules 68 and 69 ... 439

LIMITATION, *See* Landlord and tenant 440

LIMITATION. *See* Mortgage 268

LIMITATION, *See* Oudh under-proprietary right 449

LIMITATION, *See* Second appeal 432

LIQUOR. Breach of condition of license for sale of—, *See* Act (Local) No. IV of 1910, section 64 (*c*) 642

LUNACY. *See* Act No. XLV of 1855, section 84 329

MANAGER. Alienation by—, *See* Hindu Law 634

MAXIM "In pari delicto potior est conditio possidentis," *See* Pleadings 506

MESNE PROFITS *See* Act No. VII of 1870, section 7(xi) 154

MINOR, *See* Act No. IX of 1872, section 11 644

Mo[illegible]	... [illegible]
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Mo[illegible]

[illegible]

Mo[illegible] ... [illegible]

M[illegible] ... property [illegible] plaintiffs were only entitled to bring to sale a portion of the property corresponding to what was [illegible] the share of the mortgage-debt to which they were entitled.

[illegible] ... [illegible]

Mo[illegible] ... prior and subsequent mortgages [illegible] [illegible] obtained decree for sale, an execution [illegible] property [illegible] of suit, [illegible]

Held that [illegible] second mortgagee [illegible] directing redemption of the property [illegible] *Mohan Lal* [illegible]

Ram Narain [illegible] ... [illegible]

Mortgage—*Prior and puisne mortgages*—[illegible] property by each in a suit for [illegible] *Suit by representative of puisne mortgagee to redeem the prior mortgage*—*Limitation*.—A [illegible] without impleading the puisne [illegible] and in execution thereof purchased the property [illegible] formal possession. The puisne [illegible] without impleading the prior [illegible] for sale and in execution thereof [illegible] and got possession. Further transfers [illegible] mately the representative of the puisne mortgagee sued the representative of the prior mortgagee to redeem the prior mortgage.

Held that (the puisne mortgagee not having been impleaded in the prior mortgagee's suit for sale) the plaintiff, as his representative, had sixty years within which to sue for redemption. On the facts he was not barred by limitation and was entitled to the decree asked for. The principle of *Babu Lal* v. *Jalaka*, 14 A. L. J., 1146, applied.

Priya Lal v. Bohan Champa Ram, I. L. R., 43 All. ... 264

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MORTGAGE—*Redemption—What amounts to destroying the integrity of a mortgage so as to enable the mortgagor to redeem piecemeal.*] If a mortgagee releases a portion of the mortgaged property by receiving the amount of money alleged to be due from such property, he does not thereby break the integrity of the mortgage nor does the mortgagor become entitled to redemption of a portion only of the property. The integrity of a mortgage can only be broken up in case the mortgagee or mortgagees purchase a part of the mortgaged property. *Lachmi Narain* v. *Muhammad Yusuf*, I. L. R., 17 All., 63, referred to.

Ali Jan Khan *v.* Majid-ud-din, I. L. R., 45 All. ... 524

MORTGAGE, *See* Act No. IV of 1882, section 63 592

MORTGAGE, *See* Act No. IV of 1882, section 68 388

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MORTGAGE. *See* Act No. IV of 1882, section 89 149

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MORTGAGE, *See* Act (Local) No. III of 1903, sections 3, 17 and 22 ... 450

MORTGAGE, *See* Civil Procedure Code, section 115 425

MORTGAGE, *See* Construction of document 681

MORTGAGE. *See* Hindu law 49, 497

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MORTGAGE. *See Res judicata* 606

MORTGAGE BY CONDITIONAL SALE, *See* Act No. IV of 1882, section 58 ... 72

MORTGAGE. Redemption of—, *See* Pre-emption 482

MORTGAGE. Suit for redemption of—. *See* Act No. VII of 1870, section 7(ix) 154

MUAFI. Suit for resumption of—. *See* Act (Local) No. II of 1901, sections 150, 154, 168 and 177 (c)... 336

MUHAMMADAN LAW—*Dower debt—Dower not a charge on estate unless the widow has obtained peaceable possession of her husband's estate in lieu of her dower.*] A dower debt is not a secured debt but a simple debt ranking equally with other debts due from the estate. The widow's lien for dower is the right which she has, where she has taken peaceable possession of her husband's estate, to hold that estate as against the heirs of her husband until they satisfy her claim to dower. It has no application to the share which she holds in her own right as heir of her husband, still less can it give her a right to prevent another creditor against her husband's estate from recovering the amount which is due to him. *Inayat Ali* v. *Jaitun Bibi*, 18 Oudh Cases, 269, referred to.

Kaniz Fatima Begam *v.* Ram Nandan Dhar Dubo, I. L. R., 45 All. 334

MUHAMMADAN LAW—*Pre-emption*—Talab i mawasibat—*No reference to* talab i ishtishhad—*Invalidity of demand.*] Where a claim for pre-emption is based on the Muhammadan law, if the pre-emptor in making the second demand omits to call the attention of the witnesses to the fact that he had already made the first demand, the second demand is not valid, even although the witnesses to both demands may be the same. *Mubarak Husain* v. *Kaniz Bano*, I. L. R., 27 All., 160, *Sarjug Singh* v. *Jagmohan Singh*, 51 Indian Cases, 40, and *Rajjab Ali Chopedar* v. *Chandi Churn*, I. L. R., 17 Calc., 543, referred to. *Muhammad Usman* v. *Muhammad Abdul Ghafur*, I. L. R., 34 All., 1, distinguished.

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Non-joinder *See* Parties 220

Notice of suit. *See* Act No. IX of 1850, section 77 and 140 ... 558

Notice of suit, *See* Act (Kerala) No. IV of 1951, section 34 ... 863

Notice to show cause, *See* Act No. XIII of 1859, section 23 ... 670

Notice to show cause, *See* Criminal Procedure Code, section 257 ... 474

Oath, *See* Act No. X of 1873, sections 8 and 9 731

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OCCUPANCY HOLDING—*Usufructuary mortgage—Assignment of possession by mortgagee—Suit for ejectment—Private partition—Jurisdiction—Civil and Revenue Courts.*] The usufructuary mortgagee of an occupancy holding continued in possession of the holding after the death, without heirs, of the occupancy tenant, and subsequently let into possession certain co-sharers in the village, apparently in return for a money payment made in recognition of his rights as mortgagee. Certain other co-sharers, to whom the land of the occupancy holding had been allotted on a private partition amongst all the co-sharers, sued in a court of revenue to eject both the mortgagee and his assignees.

Held that the suit was properly brought in a court of revenue and that the plaintiffs were entitled to a decree against the defendants in possession as being either tenants-at-will or sub-tenants of the plaintiffs.

Hawal Rai v. Har Prasad, I. L. R., 45 All. 711

OCCUPANCY TENANT, *See* Landlord and tenant 361

"OSTENSIBLE OWNER," *See* Act No. IV of 1882, section 41 ... 520

OUDH UNDER-PROPRIETARY RIGHT—*Limitation—Adverse possession—Cancellation of notices of ejectment—Oudh Rent Act (XXII of 1886), section 108—Continuance of possession—Indian Limitation Act (IX of 1908), section 28.*] In 1893 the respondent obtained a decision of the Revenue Court under section 108 of the Oudh Rent Act, 1886, cancelling a notice of ejectment served on him by the appellant under sections 53, 54 of that Act, the Court holding that there was reasonable ground for supposing that the respondent was an under-proprietor and therefore not a tenant liable to ejectment under the Act. Subsequently he remained in possession, making to the appellant the same payment in respect of the land as formerly. In 1913 he sued for a declaration that he was an under-proprietor.

Held that the respondent's unfounded assertion in 1893 of an under-proprietary right did not by lapse of time convert him into an under-proprietor; his possession was not adverse, and section 28 of the Indian Limitation Act, 1908, did not apply as the appellant could not sue for possession.

Muhammad Mumtaz Ali Khan v. Mohan Singh, I. L. R., 45 All. 419

PANDA, *See* Agreement 79

PARIWAL, *See* Agreement 79

PARTIES—*Non-joinder of necessary parties—Duty of Court—Act No. XVI of 1908 (Indian Registration Act), section 17—Registration—Letter embodying terms of lease of immovable property—Suit for specific performance.*] A court ought not to dismiss a suit merely upon the ground that a necessary party has not been impleaded, when it has before it an application by the plaintiff to join such party as a co-plaintiff, the party being willing thereto, and when such joinder would not operate in any way to the prejudice of the defendant.

The main terms of a proposed lease of immovable property were agreed upon and embodied in a letter, a counterpart of which was kept by each party. One of the parties sued the other for specific performance of the agreement to lease and treated the letter not as evidence of an oral agreement, but as the contract itself.

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Held that the letter required registration and being unregistered could not be referred to.

Nur Muhammad [illegible] v. Nathu Lal, I. L. R., 45 All. 230

PARTITION. *See* Act No. [illegible] of 1873, section 93 21

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[illegible] ... 720

[illegible] III, [illegible] 1 and 2, [illegible] IV, [illegible] 791

[illegible] VII, [illegible] 11, [illegible] ... ... [illegible]

PLAINT. Return of. *See* Pleading 153

[illegible] *false allegations made by plaintiff in order to bring his suit within the jurisdiction of a particular court. Procedure—Return of plaint for presentation to proper court.*—Where a plaintiff puts forward in his plaint manifestly false allegations in order to enable the suit to be brought in a particular court, it is the duty of the court in which the plaint is presented, on this coming to its notice, to return the plaint to be presented in the proper court.

Abdul Ghafur v. [illegible] Ahmad, I. L. R., 45 All. ... 153

PLEADING. *Right of defendant* [illegible] *himself and plaintiff.* [illegible] deed the defendant [illegible] When [illegible] and the plaintiff and defendant [illegible] must be pleaded [illegible] the matter, and if the court [illegible] that the parties were acting [illegible] and did in fact [illegible] the court to give him [illegible] of the court is not to [illegible] other party [illegible] *v. Venkamma Hari Das*, 22 Indian Cases, 1, *Taylor v. Chester*, L. R., 4 Q. B., 309, and *Herman v. Jeuchner*, 15 Q. B. D., 561, referred to. *Sellnmappa bin Gavukappa v. Hassa bin Tukosa*, I. L. R., 31 Bom., 405, dissented from.

Vilayat Husain v. Misran, I. L. R., 45 All. ... 390

PLEADING.—*Finding on evidence against adoption set up by plaintiff. Partial admission by one defendant. Limited finding in favour of adoption as against the one defendant not possible.*—Where a court finds on the evidence generally against a specific [illegible] the plaintiff, as, for example that he, the plaintiff, was not adopted by a certain person, it is not open to the [illegible] suit to find, on the strength of an apparent [illegible] of the defendants, that, as regards certain property in possession of that defendant, the adoption must be held to be established. *Janki Das v. Ahmad Husain Khan*, I. L. R., 25 All., 159, referred to.

Kundan Lal v. Makundi Kunwar, I. L. R., 45 All. ... 571

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PRE-EMPTION—*Muhammadan law—Shafi-khalit—Pre-emptor and vendee both standing in the same relation to the property sold.*] Where in a suit for pre-emption based on the Muhammadan law both the vendee and the pre-emptor stand on an equal footing as *shafi-khalit* in the same degree, the pre-emptor is entitled to a decree for one-half of the property sold. *Muhammad Yakub* v. *Kanhai Lal*, I. L. R., 44 All., 83, followed.

Zia-ud-din v. Abul Hasan, I. L. R., 45 All. ... 487

PRE-EMPTION—Wajib-ul-arz—*Construction of document—Custom or contract.*] In a pre-emption suit based upon the village papers, where the record which is relied on for the purpose of showing custom contains a number of extraneous matters, some of which could only have reference to a contract entered into between the parties, and which could not possibly be based on custom, then it ought to be taken that the whole *wajib-ul-arz* is not properly a record of custom at all. *Surajbali* v. *Muhammad Nasir*, 16 A. L. J., 879, referred to.

Sita Ram Tiwari v. Faujdar Rai, I. L. R., 45 All. ... 490

PRE-EMPTION—Wajib-ul-arz—*Permanently settled village—Contract—Custom—Custom applicable to house property not necessarily applicable to cultivable land.*] Although a custom of pre-emption relating to sale of a permanently settled village is a matter of contract and not of custom, it cannot be applied to [illegible] varied after the death of the [illegible] such contract. *Dajiraya Gangaram Kothare* v. *Narayan Vithoba Mandlik*, I. L. R., 47 Bom., 191, referred to. *Charanjit* v. *Raghunath*, I. L. R., 39 Mad., 462, not followed.

Dalli Singh v. **Raghubar Singh**, I. L. R., 45 All. ... 492

PRE-EMPTION—*Muhammadan law—Extension of, among Hindus—Custom—Custom applicable to house property not necessarily applicable to cultivable land.*] Although a custom of pre-emption relating to house property and based upon Muhammadan law prevails in the city of Benares, it does not follow that such custom should be extended, without strict proof of its applicability, to the sale of land as distinct from house property.

The Muhammadan law of pre-emption should not be extended amongst Hindus beyond the limits established by proof of custom. *Jagjivan Haribhai* v. *Kalidas Mulji*, I. L. R., 45 Bom., 604, referred to.

Ram Chand Khanna v. Goswami Ram Puri, I. L. R., 45 All. 501

PRE-EMPTION—Wajib-ul-arz—*Custom or contract—Other matters besides pre-emption mentioned in wajib-ul-arz.*] If a *wajib-ul-arz* contains matters which could not possibly be the subject of a custom, then the ordinary presumption that the *wajib-ul-arz* is a record of custom is overturned. *Semble* if the other matters mentioned in the *wajib-ul-arz might* be the subject of custom, though they have nothing to do with pre-emption. *Fazl Husain* v. *Muhammad Sharif*, I. L. R., 36 All., 471, and *Surajbali Singh* v. *Muhammad Nasir*, 16 A. L. J., 879, referred to.

Alum Chand v. Chajju, I. L. R., 45 All. 553

RE-EMPTION—*Three pending suits for pre-emption of houses in same village against the same defendants—Two suits dismissed and one remanded—Subsequent dismissal of third suit for default—Decree thereof on the first two appeals.*] Two suits for pre-emption of separate transfers of houses in the same village to the same

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PROCEDURE, *See* Municipal elections 685

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"PUBLIC PURPOSE." *See* Act No. I of 1894, section 6 443

"PUBLIC RIGHT". *See* Civil Procedure Code, section 92 335

PUBLIC WAY, *See* Criminal Procedure Code, section 133 656

RAILWAY COMPANY—*Liability of, for goods consigned—Risk note—Construction of document.*] Goods were consigned on a "risk note" the terms of which exonerated the Railway company from responsibility for the loss of the consignment except when due, *inter alia*, to wilful neglect of the company's servants, and there was a proviso to the effect that "wilful neglect" did not include "fire, robbery from a running train or any other unforeseen event or accident."

Held on a construction of the note that "robbery" was not used in the strict legal sense as defined in the Indian Penal Code, but included theft from a running train.

Great Indian Peninsula Railway Company *v.* Bhola Nath, Debi Das, I. L. R., 45 All. 66

RAILWAY COMPANY - *Perishable goods consigned under risk-note form B destroyed owing to negligence of company's servants—Company not liable "Loss" Construction of document.*] *Held*, on a construction of risk note form B, that the word "loss" as therein used does not mean loss to the owner of goods by accident, but loss of the goods by the railway company to whom they are delivered for carriage.

Hence, where goods of a perishable nature were delivered to a railway company for carriage under risk-note form B, and by the negligence of the company's servants were so delayed in transit that they became worthless and had to be destroyed, it was *held* that the owner could not recover damages against the company. *Changa Mal* v. *Bengal and North-Western Railway Company*, Punj. Rec., 1897, p. 23, referred to.

Secretary of State for India in Council *v.* Jiwan, I. L. R., 45 All. 980

RAILWAY COMPANY—*Goods consigned under risk-note in form B—"Loss"—Suit for damages for non-delivery of goods—Burden of proof.*] The term "loss" as used in risk-note form B means loss by the railway company of goods consigned to it and not loss to the plaintiff. *Secretary of State* v. *Jiwan*, I. L. R., 45 All., 380, referred to.

The plaintiff sued for damages caused by the non-delivery of part of a consignment made over to a railway company for carriage under risk-note form B.

Held that it lay on the defendant company to give evidence that the goods had been lost, which if they had done, it would have been for the plaintiff to prove that the loss was due to a cause for which the company would be liable. *Chelikani* v. *The East Indian Railway Company*, I. L. R., 15 Mad., 1264, referred to. *Hill Sawyers and Company* v. *The Secretary of State*, I. L. R., 2 Lahore, 139, not followed. *East Indian Railway Company* v. *Nathmal Beharé Lal*, I. L. R., 39 All., 418, and *Smith* v. *Great Western Railway Company*, L. R., 1 A. C., 178, distinguished.

East Indian Railway Company *v.* Kishan Lal, Tikka Mal, I. L. R., 45 All. 630

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[illegible] burden of proof [illegible] plaintiffs [illegible] [illegible] state a [illegible] to [illegible] show [illegible] but [illegible] Secretary of State for [illegible] All., [illegible], and Fati [illegible] All., [illegible], referred to.

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[illegible] from R—Suit [illegible] Company [illegible] for [illegible] the [illegible] Railway [illegible] Railway [illegible] ... [illegible]

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[illegible] ... [illegible]

[illegible] ... [illegible]

[illegible] ... [illegible]

[illegible] ... 112

[illegible] filed in [illegible] decree [illegible] on the [illegible] first instance [illegible] give him [illegible] did not appeal against [illegible] his own appeal?

Held that [illegible] against the decree [illegible] bar to the hearing of [illegible] the defendant's appeal [illegible] distinguished. [illegible] All., 780, referred to. [illegible] 1908, p. 211, [illegible] All., 151.

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Ram Charan v. *Lachman Prasad*, 9 Indian Cases, 667, *Anant Das* v. *Udai Bhan Pargas*, I. L. R., 35 All., 187, and *Balhari Pande* v. *Shiva Sampat*, 18 A. L. J., 40, declared by the majority of the Full Bench to be no longer law.

Ghansham Singh v. Bhola Singh, I. L. R., 45 All. ... 506

RES JUDICATA—*Claim based on a sale-deed—Decision in a previous suit between the same parties as to the invalidity of the sale-deed.*] Where a claim to a certain property was based entirely on a sale-deed and the question of the validity of the sale-deed had arisen directly in a previous suit between the same parties, relating to another property also included in the deed, which could not be determined without a decision as to the validity of the sale-deed, it was *held* that the decision in the previous suit must be held to be binding as between the parties. *Ananta Balacharya* v. *Damodhar Mukund*, I. L. R., 13 Bom., 25, and *Khalik Yar Khan* v. *Mobarik Begam*, 7 Indian Cases, 389, referred to.

Kedar Nath Singh v. Sheo Shankar, I. L. R., 45 All. ... 515

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